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Sec 15

REPORTS OF CASES

cf 1.3

DECIDED IN

^{Oregon}
THE SUPREME COURT

OF THE

STATE OF OREGON,

FROM SEPTEMBER TERM, 1870, TO DECEMBER TERM, 1873.

C. B. BELLINGER,
REPORTER

VOL. IV.

2

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JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

P. P. PRIM (Chief Justice from 1870 to 1872).

W. W. UPTON (Chief Justice from 1872 to 1874).

B. F. BONHAM.

L. L. McARTHUR.

A. J. THAYER (Elected in 1870—died April 26, 1873).

L. F. MOSHER (Appointed 1873, *vice* THAYER).

C. G. CURL, CLERK.

ROLL OF ATTORNEYS

ADMITTED SINCE THE PUBLICATION OF VOL. III OF OREGON
REPORTS.

SEPTEMBER TERM, 1872.

N. B. HUMPHREY.

JULY TERM, 1873.

WILLIAM S. McFADDEN,
WILLIAM B. GILBERT,
A. HURLEY,
J. J. MURPHEY.

DECEMBER TERM, 1873.

W. W. MORELAND,
A. C. JONES,
JOHN M. GEARIN,
A. H. TOWNSEND,
FREDERICK R. STRONG,
SYLVESTER W. BICE,
FRANK J. TAYLOR,
T. V. SHOUP.

AUGUST TERM, 1874.

DAVID GOODSSELL,
LEMUEL H. MONTANYE,
CHARLES E. WOLVERTON,
J. W. ROBB,
GEORGE W. YOCUM,
WILLIAM C. GARDINER,
EMMET B. WILLIAMS,
T. G. OWEN,
THOMAS N. STRONG,
SENECA SMITH,

W. S. NEWBERRY,
J. J. BROWNE,
JAMES F. SIMMONS,
JOSEPH E. ATWATER,
GILBERT REYNOLDS,
H. CLAY WOOD,
A. F. CAMPBELL.

DECEMBER TERM, 1874.

J. W. RAYBURN,
WILLIAM H. ADAMS,
J. Q. A. BOWLBY,
ROBERT EAKIN,
JAMES A. YANTIS,
G. O. HOLMAN,
I. ALLEN MACRUM,
JOHN B. EGLIN,
F. D. WINTON,
WILLIAM H. HOLMES,
EDWARD L. EASTHAM,
C. M. KINCAID,
W. E. DARBY.

JULY TERM, 1875.

M. C. GEORGE,
E. MENDENHALL,
M. C. ATHEY,
M. S. WOODCOCK,
H. E. CHAMBERLIN,
JAMES K. WEATHERFORD,
I. H. HAZARD,
CHARLES H. WOODWARD.

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RULES

ADOPTED BY THE SUPREME COURT.

RULE 38.—When exception is taken, and the point thereof particularly stated and presented in writing to the Judge at the trial, or entered in his minutes, the formal bill setting forth the exception or exceptions, if a formal bill is desired, should be presented to the Judge as soon thereafter as practicable, and in no case will the Circuit Judge be expected to recognize such bill unless the same is presented without unnecessary delay and within the term, or within a time specified by an order made during the term and entered in the journal.

RULE 39.—Upon the argument of all motions, counsel shall be limited to fifteen minutes on each side, unless upon special order extending the time, to be applied for and made before commencing the argument. Counsel in such case may furnish the Court with written briefs.

RULE 29 (as amended at the July Term, 1875).—The causes from each judicial district shall be docketed together and be heard in the order in which they stand. Those from the First District first; those from the Fifth District, second; those from the Second District, third; those from the Third District, fourth; and those from the Fourth District, fifth.

TERMS

OF

THE SUPREME AND CIRCUIT COURTS.

SECTION 1. That a term of the Supreme Court shall be held at the seat of Government on the first Monday in January, in the year 1873; thereafter on the second Monday in December, annually, and at such other times as the said Court may appoint by an order entered in the journal in term time.

SEC. 2. That the terms of the Circuit Court for the several counties in the First Judicial District shall be held annually as follows: In the county of Josephine, on the fourth Monday in April and the fourth Monday in October; in the county of Jackson, on the second Monday in February, June and November.

SEC. 3. That the terms of the Circuit Court for the several counties in the Second Judicial District shall be held annually as follows: In the county of Douglas, on the third Monday in October and the second Monday in May; in the county of Curry, on the first Monday in June; in the county of Coos, on the fourth Monday in May and the second Monday in September; in the county of Lane, on the third Monday in April and first Monday in November; in the county of Benton, on the third Monday in November and the second Monday in April.

SEC. 4. That the terms of the Circuit Court for the several counties in the Third Judicial District shall be held annually as follows: In the county of Linn, on the second Monday in March and the fourth Monday in October; in

the county of Marion, on the fourth Monday in February, the second Monday in June and the third Monday in October; in the county of Yamhill, on the fourth Monday in March and the first Monday in October; in the county of Polk, on the second Monday in May and the first Monday in December.

SEC. 5. That the terms of the Circuit Court in the several counties in the Fourth Judicial District shall be held annually as follows: In the county of Clackamas, on the fourth Monday in April and the fourth Monday in September; in the county of Multnomah, on the second Monday in February, June and October; in the county of Columbia, on the second Monday in April; in the county of Clatsop, on the second Tuesday in August and the fourth Tuesday in January; in the county of Washington, on the fourth Monday in May and the first Monday in October.

SEC. 6. That the terms of the Circuit Court in the several counties in the Fifth Judicial District shall be held annually as follows: In the county of Grant, on the third Monday in September and the first Monday in June; in the county of Baker, on the first Monday in October and the third Monday in May; in the county of Union, on the third Monday in October and the first Monday in May; in the county of Umatilla, on the fourth Monday in October and the last Monday in April; in the county of Wasco, on the second Monday in November and the third Monday in June.

(Act of October 28th, 1872, as amended by Act of October 26th, 1874.)

PROCEEDINGS OF THE COURT

ON THE

DEATH OF HON. A. J. THAYER.

THE Supreme Court at Salem, on July 24, 1873, at the conclusion of the usual business of the day, on motion of Hon. William Strong, adjourned out of respect to the memory of Hon. A. J. THAYER, deceased, Associate Justice. At the opening of the Court, on July 25, 1873, Hon. John Kelsay, on behalf of a committee of the Bar, presented the following resolutions, and asked to have them entered on the journal of the Court:

Resolved, That in the death of Judge A. J. THAYER, the legal profession of the State of Oregon has lost a judicial officer whose ability and integrity, exhibited during his service upon the Bench, have secured its lasting confidence and esteem.

Resolved, That the loss is not confined to the members of the Bar, nor to his associates upon the Bench of the Supreme Court, but it will be felt by the citizens of the State, to a large number of whom he was long and favorably known; and he will be mourned by that portion of the business community whose interests were, or were likely to be, submitted to his patient investigation, his calm judgment, and diligent search.

Resolved, That we, who have been acquainted with his judicial career, will hold in grateful remembrance his courtesy and kindness, which were never wanting, though specially manifested toward the young and timid; and that we will

ever hold in just remembrance the exalted views of professional honor and rectitude, which were exemplified in his long professional life.

Resolved, That a report of the proceedings of this meeting of the Bar of the State, together with their resolutions, be presented to the Supreme Court of the State, now in session, with a request in our behalf that the same be spread upon the records of the Court in evidence of our sorrow for the death of Judge THAYER, and respect for his memory.

JOHN KELSAY,
W. C. JOHNSON,
E. C. BRONAUGH,
Committee.

H. Y. Thompson, Esq., on behalf of the Circuit Court and Bar of the Fifth Judicial District, presented a transcript of proceedings in the Circuit Court of the Fifth Judicial District as follows, and asked that they be entered on the journal of this Court:

Be it remembered, That at a regular term of the Circuit Court of the State of Oregon for the County of Union, begun and held at the Court-house in La Grande, Oregon, on the 5th day of May, A. D. 1873,—present, Hon. L. L. McArthur, Judge; W. B. Laswell, District Attorney; Arthur Warnick, Sheriff, and S. M. Black, Clerk,—the following, among other proceedings, were had:

L. O. Sterns, Esq., arose and addressed the Court as follows:

May it please the Court: It becomes my painful duty to announce the sad intelligence that Hon. A. J. THAYER, one of the Justices of the Supreme Court of this State, is dead, and to present the proceedings of a Bar meeting held today, with the request that those proceedings and the resolutions adopted at that meeting be spread upon the journal of this Court.

COURT-ROOM, LA GRANDE, OREGON,
May 5th, 1873.

At a meeting of the members of the Bar of the Fifth Judicial District, called to take suitable action in regard to the death of Hon. A. J. THAYER, Judge of the Supreme Court of this State, which occurred on the 26th ult., Hon. L. O. Sterns was chosen Chairman, and S. Ellsworth, Esq., Secretary; whereupon, on motion, a committee was appointed, consisting of Messrs. Slater, Baker and Reed, to prepare a suitable preamble and resolutions. After due deliberation, said committee reported the following resolutions, which, on motion, were unanimously adopted:

WHEREAS, The sad news of the death of Hon. A. J. THAYER, one of the Justices of the Supreme Court of the State of Oregon, has been received; therefore,

Resolved, By the members of the Bar now assembled at La Grande, that we have received the sad news of the death of Judge THAYER with feelings of the deepest sorrow and regret, and with a sense of the loss of an upright, laborious and impartial judicial officer;

That the loss is not confined to the members of the Bar, nor to his associates on the bench of the Supreme Court, but will be felt by the citizens of this State, to a large number of whom he was personally long known, and will be mourned by that portion of the business community whose interests were, or were likely to be, submitted to his patient investigation, his calm judgment and diligent search;

That as members of the Bar, practicing before the Court of last resort, we can never recall the name or memory of Judge THAYER without associating with it the courtesy, indulgence and kindness which were extended to us by him as a member of the Court;

That a copy of this preamble and resolutions, with a record of this meeting as spread upon the records of this Court, be transmitted to the widow of the deceased, to whom we tender the sincere expression of our sympathy with her in her distress. And further, that a copy thereof

be forwarded to the Clerk of the Supreme Court of this State, to be filed in his office and presented to the said Court at its next session.

On motion, the Chairman of the meeting was requested to report to the Circuit Court now in session the record of this meeting, with the accompanying resolutions, with a request on the part of this meeting that the Court will thereupon adjourn for the day, out of respect for the memory of the deceased.

On motion, the meeting adjourned.

S. ELLSWORTH,
Secretary.

L. O. STERNS,
Chairman.

After remarks made by Messrs. Sterns, Reed, Ellsworth, Slater, and Haines, Mr. Justice MCARTHUR said:

Gentlemen of the Bar: The Court is deeply impressed with the preamble and resolutions. In all that has been said the Court fully concurs.

The death of my brother, Judge THAYER, though not altogether unlooked for, is very unfortunate. Besides being a personal loss to his family and to a very large circle of warm and admiring friends, it is a public calamity.

Nearly twenty years have passed since he took up his abode in Oregon, and during all that time he labored unceasingly to advance every interest and every enterprise likely in any way to conduce to the interests of the State.

He was prepared for and admitted to the bar in the State of New York, and continued the practice of his profession from the time of his arrival in Oregon up to the year 1870, when he was elected to the Supreme Bench.

As a lawyer he was industrious, energetic, careful. As an advocate he was clear, earnest, forcible. As a Judge he was laborious, impartial, fearless. In his intercourse with his brethren he was at all times affable in his bearing towards the bar. He was ever courteous in private life. The walks of life he adorned. He was sincere in kindness, quiet in generosity.

In the bosom of his family, where man's true character can only be seen, he was ever affectionate and loving. His

devotion to his wife and children and their reciprocal affection were the joy and comfort of his life. Though firm in his friendships, he was not unyielding in his animosities. He magnanimously forgave his enemies, and generously expelled from his mind all remembrance of his wrongs. During his life he held many positions of honor, and discharged the trusts committed to his hands with fidelity and honesty.

Of the death of such a one, it is meet that more than passing notice should be made. It is therefore ordered that the resolutions and proceedings of the Bar meeting this day held, together with the remarks made in submitting the same, be spread at large upon the journal of this Court; that copies thereof, under the seal of the Court, be forwarded to the family of the deceased, and to the Clerk of the Supreme Court, to be presented to that honorable tribunal at its next regular session, and that this Court stand adjourned for the day.



PROCEEDINGS OF THE COURT

ON THE

DEATH OF HON. JOSEPH G. WILSON.

IN the Supreme Court at Salem, Oregon, on July 27, 1873, Hon. R. P. Boise, on behalf of a committee of the Bar, presented the following resolutions, which were ordered spread upon the journal of the Court:

WHEREAS, Hon. JOSEPH G. WILSON, Representative from Oregon in the Congress of the United States, late an Associate Justice of the Supreme Court of this State, and for many years an able and distinguished attorney at the bar, has recently been stricken down by the unsparing hand of death in the midst of his career of usefulness and honorable labor. Now therefore we, the members of the Bar in attendance upon this term of the Supreme Court, desiring to pay a merited tribute of respect to our deceased brother, do

Resolve, 1. That while in common with all the citizens of Oregon we mourn in the death of Judge WILSON the loss of an able, fearless and worthy Representative in Congress, we recognize in this sad event a special calamity to the legal profession of this State, of which the deceased was so lately and so long a distinguished ornament; that the ability, industry and integrity of our late associate, during his long practice at this bar and while upon the Supreme bench, uniformly commanded our esteem and confidence, while his unflinching courtesy, cheerfulness and geniality won all our hearts.

2. That we willingly bear testimony to the fact that the talent and bearing of Judge WILSON have left an indelible impress upon the jurisprudence of our State and have builded a monument more enduring than brass, and that his decease has made a void in the ranks of our profession which will not be soon or easily filled.

3. That we tender to the afflicted family and friends of the deceased our heartfelt sympathy in their great bereavement.

4. That a copy of these resolutions be presented to the Supreme Court now in session, with the request that they be spread upon the journal and that suitable action be taken thereon.

R. P. BOISE,
SYL. C. SIMPSON,
J. N. DOLPH.

SEPTEMBER TERM, 1869.

NOTE.

The References to the Laws of Oregon in this volume
are to the Revised Edition of 1874.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

SEPTEMBER TERM, 1869.

JAMES HEATHERLY AND MARY J. HEATHERLY,
APPELLANTS, v. HENRY G. HADLEY AND H. C.
OWEN, RESPONDENTS.

DISPENSING WITH THE CLASSIFICATION OF BILLS—RIGHTS OF SUITORS.—
 The Code, by dispensing with the classification of bills, has not taken away the right of suitors to present any cause of suit that formerly could be presented by any form of bill.

JURISDICTION.—Having obtained jurisdiction for one purpose, a Court of equity may hold it for all purposes connected with the transaction.

PROOF CANNOT AID AN ALLEGATION OF SERVICE.—Proof cannot add to the force of an undisputed allegation of the pleading. Where the pleading points out a particular mode of service, if the mode pointed out falls short of due service, proofs cannot aid the allegation. Nothing shall be intended to be out of the jurisdiction of a Superior Court except that which specially appears to be so.

RECORD RECITAL OF JURISDICTIONAL FACTS.—If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked collaterally. If the record is silent as to jurisdictional facts, they will be presumed to have been duly established, but such presumption may be rebutted by extrinsic evidence. If it appears by the record expressly, or by necessary implication, that the cause of action was beyond the jurisdiction of the Court, or that the Court proceeded without notice to the parties, no presumption in favor of the jurisdiction arises, and the judgment will be void.

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Statement of Facts.

STRICT COMPLIANCE WITH THE STATUTE NECESSARY.—When a Court of record seeks to acquire jurisdiction by a course specially pointed out by statute, a strict compliance is necessary.

PROOF OF SERVICE.—Proof of service must be made in the Court in which the process is returnable.

A PARTY IS NOT PRECLUDED BY RECITALS IN A DECREE.—A recital in a decree, “that notice has been given in due form of law,” will not preclude a party from denying the jurisdiction in a suit brought to reform the decree. When the decree contains a recital that due service was made and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return.

EXTRINSIC EVIDENCE IN AID OF THE RECORD.—When extrinsic evidence is admitted in aid of the record, the fact permitted to be proved in a subsequent proceeding is not solely that process was in fact served, but that there was proof of service before the Court that rendered the decree.

ADMISSION OF SERVICE.—An admission of service must state the time and place.

APPEAL from Marion County.

This is a suit in equity, brought by plaintiffs to have a certain decree of foreclosure rendered against them and others in favor of defendants, in the Circuit Court for the County of Lane, in October, 1863, and the sale made under it, set aside, and an accounting taken between the parties, upon the grounds—

That there is no proof, as required by law, of the service of summons, and that the Court had no jurisdiction in the prior suit; and

That the decree in that suit was for a greater amount than was due, and that it was procured by fraud.

At the preceding term of this Court, the suit was heard upon an appeal from a decree rendered in favor of the defendants upon the pleadings. The proceedings upon that appeal are reported in 2 Ogn. 269. The decree appealed from was then set aside, and the case being remanded to the Circuit Court for further proceedings, was heard before a referee upon proofs, without amendment of the pleadings. The referee found among other facts that there was no legal service of summons upon Heatherly; that the Sheriff's return did not show such service, and that it could not be shown in any other way; that the Court had no jurisdiction,

Argument for Appellants.

and that the judgment and sale should be set aside. He then proceeded to state an account between the parties, in which he found Heatherly indebted to defendants about \$6400, on payment of which he was to have possession of the premises.

Both parties filed exceptions and moved to set aside the report, and defendants moved the Court on the pleadings and evidence to dismiss the bill. This motion was allowed, the Court finding that the original decree of foreclosure was valid and binding; that the sale made under it passed the title to the purchaser; that there was no fraud or misrepresentation in procuring the decree; that the sale was regular, and that legal notice thereof had been given.

The other facts appear in the opinion of the Court.

Williams & Willis, for Appellants.

The only proof of service of summons and complaint authorized by law is the return of the officer thereon. (Civ. Code, § 53.)

It does not appear by this certificate that a *certified* copy of the complaint was served;

That James Heatherly could not be found;

That a certified copy of complaint and summons was left for defendant James Heatherly, and it appears that but one copy of the complaint and summons was left for two defendants. She was one of the defendants upon whom they attempt to prove service by this return, and it was necessary to leave copies with her to get service on her, and if the complaint had been duly certified, it might have been a service on her. It ought to clearly appear that he was the person intended to be served, and that the service was sufficient. (1 Ogn. 112, 113, 114; 24 Ill. 227.)

Jurisdictional facts ought to appear affirmatively, and when what was done appears by the return, it cannot be aided otherwise. Where other than personal service is relied on, there must be a strict compliance with the statute. (13 How. Pr. R. 43; 16 How. Pr. R. 144, 149, 150; 12 Cal. 100-2; 20 Cal. 81; 14 How. Pr. R. 381; 3 How. Pr. R. 109; 34 Barb. N. Y. 95; 26 Ill. 507.)

Argument for Appellants.

If a Court has acted without jurisdiction, the proceeding is void. And if this appears upon the record the whole is a nullity. (11 Wend. 648, 652; 14 How. (U. S.) 337; 28 N. Y. 294; 30 Ill. 109, 116; 23 Ill. 445; 13 Wisc. 569; 18 Ill. 551.)

The defendant may show, notwithstanding it is averred in the record that he was duly served, that in fact he never was served. (5 Wend. 148; 9 Wisc. 328; 16 Ill. 27.)

Where the record discloses a particular mode adopted to obtain jurisdiction, if that is not sufficient, it will not be presumed that any other mode was adopted, or that jurisdiction was acquired in any other way. (14 Wisc. 28; 23 U. S. Dig., p. 344, div. 119.)

The decree of foreclosure was void, and not voidable, and the remedy is not, as contended, by appeal, for no appeal would lie under our Code, nor by motion under § 100 of the Civil Code, for that only provides relief for "mistakes in advertence, surprise, or excusable neglect" of a defendant in suffering a judgment at law to go against him, but a decree may be impeached under § 377 of the Civil Code.

By that section, "bills of revivor, of review, cross-bill, etc., are abolished," "but a decree in equity may be impeached and set aside, or suspended, or avoided, or carried into execution by an original suit." This may have abolished the remedy in any of the ways referred to, but left the right formerly obtained in that way to be now obtained by an original suit to impeach a decree. And this section in equity practice has a similar meaning to § 62 in pleading at law. By bill of review, judgments and decrees were always set aside for defects apparent on the record (Story Eq. Pl. § 407), of jurisdiction or otherwise. Such a bill was not an original bill, but was filed by leave of the Court. Under our practice the same rights are enforced without leave, by an original bill to impeach a decree. And the decree may be impeached for want of jurisdiction in the Court to render it; and when thus drawn in question for that purpose, it is not a *collateral* attack, but a *direct* proceeding to impeach, and no presumptions will be indulged

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in its favor, but whatever is necessary to support it must appear. (4 Tex. 391; 11 Cal. 372; 30 Ill. 223; 13 Ohio State R. 438.)

Equity grants relief not only against deeds, writings, and solemn assurances, but against judgments and decrees, obtained by fraud and imposition. (2 Barb. 586; 3 Barb. 616; 1 Johns. Ch. 401.)

S. Ellsworth and L. F. Mosher, for Respondents.

There is on file with the testimony a complaint sworn to by James Heatherly, in which it is stated that the service was made by a copy of complaint prepared and certified to by plaintiffs' attorney. In addition to this, the decree of foreclosure recites that "the defendants being duly served with process, come not," etc.

1. The return of the Sheriff is, by a fair interpretation of the language, a full and complete service according to the statute. It is not necessary to serve the wife in a foreclosure suit. (2 Johns. Ch. 139; *Fahie v. Pressy*, 2 Ogn. 22.)

2. The jurisdiction of Superior Courts is presumed, and their judgments are conclusive in themselves, unless plainly beyond their jurisdiction. (*Astor v. Grignon's Lessee*, 2 How. 319; *Foot v. Stevens*, 17 Wend. 483; *Hart v. Sexias*, 21 Wend. 40; *Voorhees v. Bank United States*, 10 Pet. 193; *Tallman v. Ely*, 6 Wisc. 244; 13 Ohio (N. S.), 446; 14 Iowa, 309; 9 Cal. 320; 33 Cal. 505; 11 Cush. Mass. 277; 10 Allen, 488; 20 N. Y. 298; 40 Barb. N. Y. 417.)

The law on this point is laid down by the Supreme Court of this State in *Carland v. Heineborg* (2 Ogn. 97), in these words: "It is essential that Courts have such jurisdiction, that parties and their rights shall not be unfairly dealt with; and when a Court has so disposed of its business as to leave no other impression upon us, after due consideration, than the strongest of presumptions that it has properly exercised its authority, neither technicality, nor apparent omission, nor loss, should cause us to disturb a solemn decree."

3. Where the record of a Superior Court sets forth the

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facts necessary to give it jurisdiction, they cannot be contradicted in a collateral proceeding. (*Astor v. Grignon's Lessee*, 2 How. 319; 39 Ill. 127; 31 Ill. 162; 27 Ill. 145, 496; 33 Cal. 678; 14 Iowa, 309; 22 Maine, 128; 18 Pick. 393; 13 Ohio (N. S.), 431; 1 Smith Leading Cases, 841.)

4. The testimony in this case shows that the service was correctly made. This testimony was not introduced to contradict the Sheriff's return, but to show that the supposed irregularity in the service was a technical defect of the Sheriff in making his return. That proof of the service can be made *aliunde*, we cite: 6 Barb. N. Y. 621; 2 Ogn. 53; 6 Wisc. 256; 20 N. Y. 304; 2 Hill, 413; 1 Ogn. 295; 15 Johns. 121.

5. Irregularities in service do not render a judgment void, but voidable. (*Fisher v. Bassett*, 9 Leigh, 119; *Prigg v. Adams*, 2 Salk. R. 674; 18 How. Pr. R. 347; 4 E. D. Smith, N. Y. 428; 12 Barb. N. Y. 547; 2 Barb. N. Y. 586.)

6. If the Court had jurisdiction, a sale made under its decree cannot be set aside, however erroneous, and the plaintiff in execution stands in the same position of any other purchaser. (*Gray v. Brignardello*, 1 Wall. 627; *Parker's Heirs v. Anderson's Heirs*, 5 T. B. Monroe, 445.)

7. Sheriff's sale was regularly confirmed. (Civ. Code, § 293, sub-div. 4.)

By the Court, UPTON, J.:

The prominent points presented for our consideration by this appeal are embodied in the following opinion delivered in the Circuit Court upon rendering the decree appealed from:

"The Court finds that (in the view the Court takes of the case as it is now presented) many of the findings of the referee become immaterial, for the referee holds that the decree of foreclosure was void for want of sufficient service on the plaintiff (then defendant) to give the Court jurisdiction.

"I entertain a different view, and hold that the decree, in the absence of fraud or mistake in procuring it, is binding

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and cannot be declared void in a collateral proceeding by mere inspection of the record.

“And as there is no sufficient evidence of fraud in the procurement, the decree will have to stand and is binding on the land, and the sale under it operates as a transfer of the title. I think the objection to the regularity of the sale, on the ground of a want of notice, cannot avail to disturb the sale at this time, in the absence of evidence to show that there was fraud and collusion in making it, or injury to the plaintiff. And I also think that the weight of authority is in favor of the purchaser.

“The real issue in this cause is as to whether there was fraud or not in procuring the decree of foreclosure which this suit is brought to set aside.

“I fully agree with the findings of the referee in that behalf, that there is no sufficient evidence of fraud. And as the plaintiff has failed in this issue, the plaintiff cannot open the decree to inquire into the various amounts that went into that decree to make up its aggregate; for this suit is not brought to reform the decree in these respects; it is to declare the decree void and then go into the original account between the parties and strike a balance between them, to ascertain what is now due on the mortgage for which the land is liable, and as the Court cannot set aside the decree, it cannot go into these accounts. I think also, in a case of this kind, when an issue has been made on the facts of the regularity of the service, that declarations of the plaintiff that he was duly served and had due notice of the suit in which the decree was rendered, may be given in evidence to support the regularity of the service and to show jurisdiction.”

The two questions for determination are:

First. Is the attempt to impeach the original decree which is made by this plaintiff direct or collateral?

Second. If it be found to be direct, are the grounds for setting it aside sufficient?

In reply to the first question, we are unable to assent to the proposition that this is a collateral proceeding.

The statute abolishes bills of review, and the nomencla-

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ture of bills heretofore used, and provides that “a decree in equity may be impeached and set aside, or suspended, or avoided, or carried into execution by an original suit.” (Civ. Code, § 377.) A bill of review, for which the Code now substitutes an original suit, was a bill filed to procure an alteration or reversal of a decree made in a former suit. It was requisite that a bill of review show either error in law appearing *in the record*, without resorting to extrinsic evidence, or some new matter that has arisen in time after the decree, or some discovery after the decree. If the facts stated in the complaint, taken as true, show such errors in law appearing in the record of the former suit as justify the intervention of a Court of equity, this case is such as was formerly presented by a bill of review; or by a bill in the nature of a bill of review, according to whether or not the decree had been enrolled.

The gravamen of the complaint in this case is the wrong alleged to be done by the rendition of a decree for more money than was due; for interest that was unlawful, and upon a false representation of the condition of the accounts; and that such decree was rendered when, for want of sufficient service, the Court had no jurisdiction of the person of the defendant, the present plaintiff. The complaint also charges that the decree was obtained by fraud. Facts are stated in the complaint which, if true, would authorize a Court of equity to suspend or set aside the decree, and to order an account, and decree a resale of the premises.

The complaint, besides containing the general prayer, asks specifically, not only that the decree may be set aside, but that an account may be taken, and that the present plaintiff be allowed to redeem.

It will not be seriously contended that the Code, by dispensing with the classification of bills, has taken away the right of suitors to present any cause of suit that formerly could be presented by any form of bill. Every complaint is to be judged by the facts stated in it, and not by its formal words; and the prayer for general relief authorizes the Court to administer such relief as is required by the

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case made by the pleadings and evidence. (Story, Eq. Pl. §§ 40, 41.)

It is true, the complaint treats the original decree, and the sale made under it, as void for want of service of summons; and it has been held that equity will not relieve against a void judgment or decree. If relief from a deed alleged to be void was the only point presented, it could be well questioned whether this suit could be maintained at all. It has, however, often been held that a void decree may be a cloud on title to real estate. (*Johnson v. Johnson*, 30 Ill. 2-15.) But beyond that, the bill charges fraud, mistake and the abuse of a trust, and the pleadings show a complicated and disputed account, with a lien upon land for a balance yet to be ascertained. To determine the character of this proceeding and the jurisdiction, the complaint is taken as true. Several grounds of equity jurisdiction appear by the bill. There is no better established rule of equity practice than that, having obtained jurisdiction for one purpose, a Court of equity may hold it for all purposes connected with the transaction.

Appeal cases in equity are to be "tried anew upon and in regard to all questions both of law and fact presented by the transcript." (Civ. Code, § 533.)

If this Court finds that the original decree and sale are invalid, there is no reason why it cannot proceed to determine the state of the accounts, and if a sale is necessary, to decree a sale in case of non-payment. If the Circuit Court had found that the present plaintiff, James Heatherly, was not served with summons in the former suit, it would have been proper for that Court to ascertain the state of the accounts between the parties and make final determination of all matters presented by the pleadings. The facts necessary to a complete determination of the controversy are set out in the pleadings, and the Court was authorized by its general equity powers, as well as by the express directions of §§ 241 and 397 of the Civil Code, to hear and pass upon them.

This point having been disposed of, we come, secondly, to the question whether the grounds upon which the original

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decree is attacked or any of them are sufficient to justify its avoidance, and the entry of a decree consistent with the equities of the case as now presented.

Two prominent reasons are assigned by the appellants, in their complaint, why the decree which they attack should be set aside. They are:

First. Fraud in its procurement.

Second. Want of jurisdiction, of the person of the appellant, in the Court rendering the decree.

The finding of the referee against the alleged fraud being sustained by the Circuit Court, need not be further considered.

What is sufficient service of process, and what is competent proof of service, are questions of very great practical importance, upon which the title to property often depends, and they should rest upon well-defined principles and be governed by settled rules. The facts relied upon to establish service of summons are contained in the allegations of the answer and are there stated in the following words: And the said defendants "deny that he, the said James Heatherly, had no notice of the commencement of the said foreclosure suit. But on the contrary, defendants allege that although said James Heatherly was absent temporarily from the county, having gone professionally, as he stated in his own oath in one of the former suits heretofore mentioned, to raise money to redeem his mortgaged property, yet both said defendants were duly and legally served with summons and complaint in said foreclosure by personal service thereof, by the Sheriff of Lane County, as is substantially stated on oath by James Heatherly, in one of the former suits hereinafter mentioned, *and as will more fully appear* by the said Sheriff's return of service endorsed on the said summons, directed to said plaintiffs (then defendants), of which the following is a copy, to wit:

"I hereby certify that I have this 14th day of October, 1863, served the above summons by leaving a certified copy thereof, together with a copy of the affidavit and complaint prepared by plaintiff's attorneys, in the hands of Mary J. Heatherly, wife of the defendant, James Heatherly (she

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being a white person above 14 years of age), at his usual place of abode in Lane County, Oregon.

“T. J. BRATTAIN,

“ Sheriff.

“And as defendants believe, and therefore allege, plaintiff, James Heatherly, had knowledge of said judgment a few months after its rendition by way of one Mowry, to whom he claimed to have sold some of the mortgaged premises.”

As these are all the facts alleged in regard to the service, the case cannot be made stronger by proving facts that are not alleged. The replication denies none of these allegations, except that the Sheriff made the return above recited; that denial is in the form of want of knowledge or information and was deemed of no effect when the case was before this Court at the last term; and the return was produced before the referee and is literally as set forth in the answer. The first sentence above quoted from the answer does not present an issue, for two reasons: First, it speaks of a notice, but does not affirm or deny anything in regard to a summons. Second, it is qualified by the subsequent statements, which undertake to specify how Heatherly received notice. If we except the denial relating to the form of the Sheriff's return, it is evident there is no issue of fact as to whether or not Heatherly was served with process. The Sheriff's return is produced and made part of this record; and all other evidence in regard to the service is irrelevant for want of an issue.

The sole inquiry in regard to service is, whether the facts alleged in the answer and above set out, constitute service of summons and confer jurisdiction of the persons of James Heatherly and wife. The referee's report shows that these defendants did introduce evidence, under objection, to the effect that James Heatherly was absent from the State at the time of this service, and remained absent until a considerable time after the judgment and the sale of the premises, and that he said, in a sworn complaint filed by him, that a copy of the summons and complaint was left with his wife.

I cannot conceive that this evidence would, if properly

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introduced, make any stronger case than that stated in the answer; on the contrary, it would strongly tend to show that the place where the copy was left with the wife was not the defendant's place of abode. This branch of the subject may be dismissed for the present by repeating that proofs cannot add to the force of an undisputed allegation of the pleadings. The question of jurisdiction of the person is limited to the inquiry whether the answer shows that Heatherly and wife were served with process.

The statute provides that "the summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared *and certified* by the plaintiff, his agent or attorney," as follows: * * * * * "To the defendant personally, or if he be not found, to some white person of the family, above the age of fourteen years, at the dwelling-house or usual place of abode of the defendant." And § 60 of the Code provides that "proof of the service of the summons, or of the deposit thereof in the post-office, shall be as follows: If the service or deposit in the post-office be by the Sheriff or his deputy, the certificate of such Sheriff or deputy, or if by any other person, his affidavit thereof, or in case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same; or the written admission of the defendant. In case of service otherwise than by publication, the certificate, affidavit, or *admission* must state the *time and place* of service."

The answer alleges that Heatherly and wife were served *as will more fully appear* by the Sheriff's return.

An attempt was made in the argument to sever the language of the answer and make of it, not only the allegation of the service as specified in the return, but also an additional allegation of due service. The language will not bear that construction. There is but one service spoken of, and the particular mode of service is pointed out. If the mode pointed out falls short of due service, proofs cannot aid the allegation, and the answer is fatally defective.

The grounds of objection to the service as shown in the return are the following:

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1. Although it is claimed there was good service on both Heatherly and wife, yet only one copy of summons or complaint was delivered.

2. It was not served personally on Mr. Heatherly, and it does not appear affirmatively that he was “not found.”

3. It does not appear that the copy of the complaint *was certified* by the plaintiff, his agent or attorney.

I can see no reason for taking a view of any of these points more favorably to the sufficiency of the service of process, than was expressed in the opinion of the Court when this case was before it, at the preceding term; but, on the contrary, several of the cases to which I shall have occasion to refer, hold to much more rigid rules than were there announced. The care exhibited by counsel in their investigations, and the able manner in which the case has been presented, as well as the importance of a thorough understanding of the principle that ought to determine a jurisdictional question, so often involving the rights of property, induce me to advert to some of the positions taken, and to several of the authorities cited.

The first position to which I will refer is that “the jurisdiction of a Superior Court is presumed.” As a general proposition, this is true.

The rule has been stated as follows: “Nothing shall be intended to be out of the jurisdiction of a Superior Court, except that which especially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, unless it be so expressly alleged.” (*Peacock v. Bell*, 1 Saund. 74; 4 Cow. 296.)

When, then, does a matter especially appear to be out of the jurisdiction?

The following rules are laid down in aid of this inquiry: “If the record contains a *recital of the facts* requisite to confer jurisdiction, it is conclusive, and cannot be contradicted by extrinsic evidence” (when attacked collaterally). “If the record is silent as to the jurisdictional facts, they will be presumed to have been duly established; but such presumption may be rebutted by extrinsic evidence.” (1 Smith’s Lead. Cases, 5th Ed. 816.)

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But the same authorities maintain the following additional propositions:

First. "If it appear by the record expressly, or by *necessary implication*, that the cause of action was beyond the jurisdiction of the Court, or that the Court proceeded without notice to the parties, no presumption in favor of jurisdiction arises, and the judgment will be void."

Second. "If the Court is not in the exercise of its general jurisdiction, but of some special statutory jurisdiction, it is as to such proceedings an inferior Court, and not aided by presumptions in favor of jurisdiction." (Id. and 2 Cowen & Hill's Notes, n. 87, p. 779.)

When a Court of record seeks to acquire jurisdiction, not in its ordinary mode, but by a course specially pointed out by statute, a strict compliance is necessary. There must be a strict compliance with the statutory mode, and the Court where the process was returnable must act upon proofs of the service *presented in that Court*. This is a point that is overlooked in the argument presented by the respondents. If we look through the authorities cited by the respective counsel in this case, we find many cases where the subject of introducing proof *aliunde* is discussed. But the proposition, that the Courts have permitted to be proved in a subsequent proceeding, is not solely, that process was in fact served, but that *there was proof of service before the Court that rendered the decree*. Accordingly the evidence is usually spoken of as admitted in aid of the record, or to supply a lost or absent record, upon the same principle that in the case of lost instruments there can be no evidence of the terms of the agreement other than the contents of the writing, so in proving a judicial proceeding what transpired in the Court is the subject of inquiry.

There arises a distinction between introducing proof to supply a lost record, or proof of what actually transpired in the Court to explain an ambiguity and in aid of the record, and offering proof of service, now for the first time, that should have been made in the Court when the cause was tried. The latter is simply a proposal to construct a record *nunc pro tunc* from the memory of witness. But the Court

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now has no control over that cause or its record, and cannot record *there* the facts found in the course of this trial, and cannot make a record that will show that that Court had jurisdiction.

A record when duly proved should import absolute verity. It should import the same thing at all times, and wherever it is produced. But the rule contended for, under which the respondent offers to prove *aliunde* that James Heatherly admitted, after the judgment was rendered, that he had been served, would make a record subordinate to, and dependent upon, the memory of witnesses. Title would be made to rest, not upon service proved in Court where the matter was adjudicated and a sale decreed, but upon *what can be* proved by the memory of witnesses, about the service of process, whenever in future that record shall be produced as the foundation of title.

The case of *Trimble v. Longworth* (13 Ohio, 431), is directly in point not only on the vital questions in this case, but upon several of the positions taken in the argument. It was a bill to reform a decree. The case seems to have been very carefully considered, and if the opinion of the Court be taken as sound law, it settles the following points:

1st. The formal recital in a decree that the defendant was duly served, does not import absolute verity when inconsistent with the return or other proofs of service filed in the cause.

2d. An attack, such as is here made upon a decree, is direct and not a collateral attack.

3d. When jurisdiction of the person is put in issue, it must be proved by the record itself.

4th. A recital in the decree "that notice has been given in due form of law," will not preclude a party from denying the jurisdiction in a suit brought to reform the decree.

5th. The return or other proof of service filed in the case is a part of the record, and in a case like the one under consideration the *record itself* shows that the Court had not obtained jurisdiction of the person.

In *Peck v. Straus* (33 Cal. 687), referred to by counsel in the argument, the objection was that the affidavit of ser-

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vice, stating that the person who served the process was a citizen twenty-one years old, did not aver that he was such when the service was made. That is, it does not appear but that he might have become a citizen or have become twenty-one years old since the service, and before making the affidavit. The case can afford us but little light. It differs from the one at bar in these particulars:

1. The defendant in the original case had actual notice and an opportunity to defend if he chose.

2. The aggrieved party does not state that the party serving was not authorized, nor that himself was misled or prejudiced.

3. He does not show that he had any defense, or could now make one if the case was opened.

4. The record shows that all the papers contemplated by law in making a service, were actually delivered to the defendant personally.

5. No claim for relief was made, except that the defendant was attempting to enforce the judgment; the plaintiff did not claim that it was for too great an amount, or that he could obtain a more favorable result if allowed to answer.

If it had been the view of the Court that a strict compliance with the statute was not necessary, or that it need not be shown by the record, reference would have been made to the case of *McMillan and Wife v. Reynolds* (11 Cal. 372), which must have been overruled to warrant such construction of the law. The same Court held, in a still later case, that a judgment was invalid when the Sheriff returned that he had served a copy, without stating whether or not it was *certified*; and it has uniformly been held by that Court, that when the statute points out a particular mode of service, the statute must be strictly followed.

Other cases are cited, but I think none of them go to the extent of sustaining the decree sought to be reviewed. Reference to them must necessarily be brief.

In *Astor v. Grignon's Lessee* (2 How. 319), it is said: "The license to the administrator is full and explicit, showing what was considered on the petition and evidence, and that

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every requisite of the law had been complied with before the order was made, by proof of the existence of all the facts upon which the power to make it depended." There was nothing in the record to contradict this, and this case scarcely goes further than to hold that when jurisdiction has been once acquired, error will not be presumed.

Foot v. Stevens (17 Wend. 483), relates to the effect of a record where *it does not appear what* steps were taken to bring the defendant into Court, and the omission is declared to be "a mere formal defect." It is not in point in a case where the mode of service is shown by the record.

Hart v. Seixas (21 Wend. 40), is also a case where the record is silent as to the mode of service.

The case of *Reno v. Pinder* (20 N. Y. 298), presents the question whether a return to which the constable's name was subscribed by another, by the constable's direction, is sufficient, and does not touch any question under consideration.

From a careful examination of all the authorities cited, I am satisfied that what was decided in regard to jurisdiction of the person, and the effect of the record, when this case was before the Court at the preceding term, is settled law both in England and America, and that a less stringent rule would be inconsistent with correct practice, and hazardous to rights of property.

But if evidence *aliunde* could be received to supply the deficiency in the record, that offered in this case is insufficient. The extraneous proof offered consists of an admission contained in a pleading filed by James Heatherly in another cause, which admission does not state any *time or place* of service, and is excluded by § 60 of the Code. Further, the document containing the alleged admission shows that James Heatherly did not dwell, and had no "usual place of abode" in this State, and knew nothing of the suit until after the decree. The alleged admissions are as follows:

First. An affidavit made in 1865, in which Heatherly deposes that there "was no personal service of the summons

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and complaint made upon this plaintiff in the action in which such sale was made.”

Second. A complaint filed by him in 1867 in which he says, “The said defendants by their attorneys of record issued a summons, irregular in not running in the name of the State of Oregon, and void as plaintiff believes, and directed to the plaintiff, Mary J. Heatherly and others, commanding said plaintiff to appear in the said Court within the given time named therein, and answer said bill named therein, or they would take judgment for the sum of \$7634 and interest, and *prepared a certified copy* of said bill and said pretended summons, and the Sheriff of said Lane County left the same with Mary J. Heatherly, wife of this plaintiff, who was then *living separate and apart from him*, thereby claiming to have served this plaintiff with notice of said suit. And plaintiff further alleges that at the time of commencement of said suit, and at the pretended service of said summons, and at the rendition of the judgment therein, hereinafter mentioned, this plaintiff was absent from the State of Oregon and *residing in Idaho Territory*, and continued to be until December, 1864, and denies all knowledge of the suit until long after judgment.”

The admission does not show the time or place of service, nor show whether it was the same transaction mentioned in the Sheriff's return, *nor who certified* to the copies. The probabilities may be that a copy of the complaint was certified “by the plaintiff, his agent or attorney.” But courts will not intentionally take jurisdiction of the person upon probabilities, and thus make up a record that is to import absolute verity against the person or the property of the citizen when it is uncertain whether he has notice. Proof is entirely wanting to show who certified to the copy mentioned. It may be that this same paper was left at Mr. Heatherly's house, and that Mr. Heatherly was deposing falsely in regard to his place of abode. But in the absence of proof this Court cannot assume that the copies mentioned by Heatherly were certified by a particular person, nor that they are the copies mentioned in the Sheriff's return. In addition to this, is the vital point whether

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proof of service was made *in the Court* that decreed the sale; and the other, equally fatal, that the allegations of the answer are no broader than the facts proved by the Sheriff's return, and these allegations cannot be enlarged by evidence. Since none of the allegations of the answer, in this respect, are put in issue by the replication (the want of knowledge of the existence of the Sheriff's return being treated as shown on the former appeal), not even a perfect judgment-roll could be properly put in evidence, because no issue of fact is presented on the point.

A party is not allowed to state one case in his bill or answer and make out a different one by his proofs. (*Boon v. Chiles*, 10 Pet. 209; 3 Wheat. 527; 6 Wheat. 468; 11 Wheat. 103; 7 Pet. 274.)

I infer that on the trial in the Circuit Court special attention was not given to the latter point, for the Chief Justice says: "I think, also, in a case of this kind, *where an issue* has been made on the *fact* of the regularity of service, that declarations of the plaintiff that he was duly served and had due notice of the suit in which the decree was rendered, may be given in evidence to support the regularity of the service and show jurisdiction." We have seen that the pleadings do not present such an issue of fact, and the evidence offered does not show an admission of service; and there is no pretense that proof other than the return was made in the Court that made the record. The practice contended for would inevitably impair the value of record evidence.

There are many cases of defective service where Courts of equity have refused to interfere to disturb the judgment or decree, but upon the ground that the bill disclosed no equity in the plaintiff. Where it is disclosed by the bill that the decree prayed for would have no effect but to enable the plaintiff to perpetuate a fraud or delay a creditor, equity declines to interfere; not on the ground that the defective service is held good, but that the Court has a discretion which should only be exercised in favor of a meritorious cause.

There is nothing in the position taken by counsel that

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the objection to the mode of service is technical. It is perfectly evident that Heatherly knew nothing of this suit until his land was sold; that if he has lost a chance to defend, it is because by a technical compliance with the statute the defendants have secured technical rights. The rule that requires a statute to be strictly pursued in order to obtain a right given solely by statute, is no more technical than a rule that makes a deed evidence of title to land and excludes parol evidence of a sale, or the rule that excludes parol evidence of the terms of a written contract. On the contrary, the effort to hold property by a decree and sale which the buyer knew was made during the absence and without the knowledge of the former owner, rests all its validity upon a technical compliance with the statute. Rights thus acquired are as purely technical as it is possible to imagine. *When acquired* they are entitled to full protection, but there is no intermediate standpoint between a perfect right, and the absolute nullity that results from a failure to comply with the statute.

If these defendants have strictly pursued the statute, and this is disclosed by their answer, and if they are chargeable with no fraud, either actual or constructive, they have obtained the mortgaged property, whether these plaintiffs had or had not knowledge of the proceedings. But if their answer lacks anything of showing such strict compliance in obtaining service, they have taken nothing by the proceeding. It is no objection that their proceeding is technical, or that one man's property is conveyed to another without his having actual knowledge of any suit. The present plaintiff was bound to know the law, and to know that if the present defendants complied with it, they could foreclose without personal notice to him. And on the other hand, he may well claim that nothing short of a compliance with the statute shall affect him or his property. The decree sought to be reviewed by this suit contains the following recital:

“This cause coming on to be heard on the bill of complaint, and the defendant, though duly served with process, having failed to answer and made default,” it is ordered,

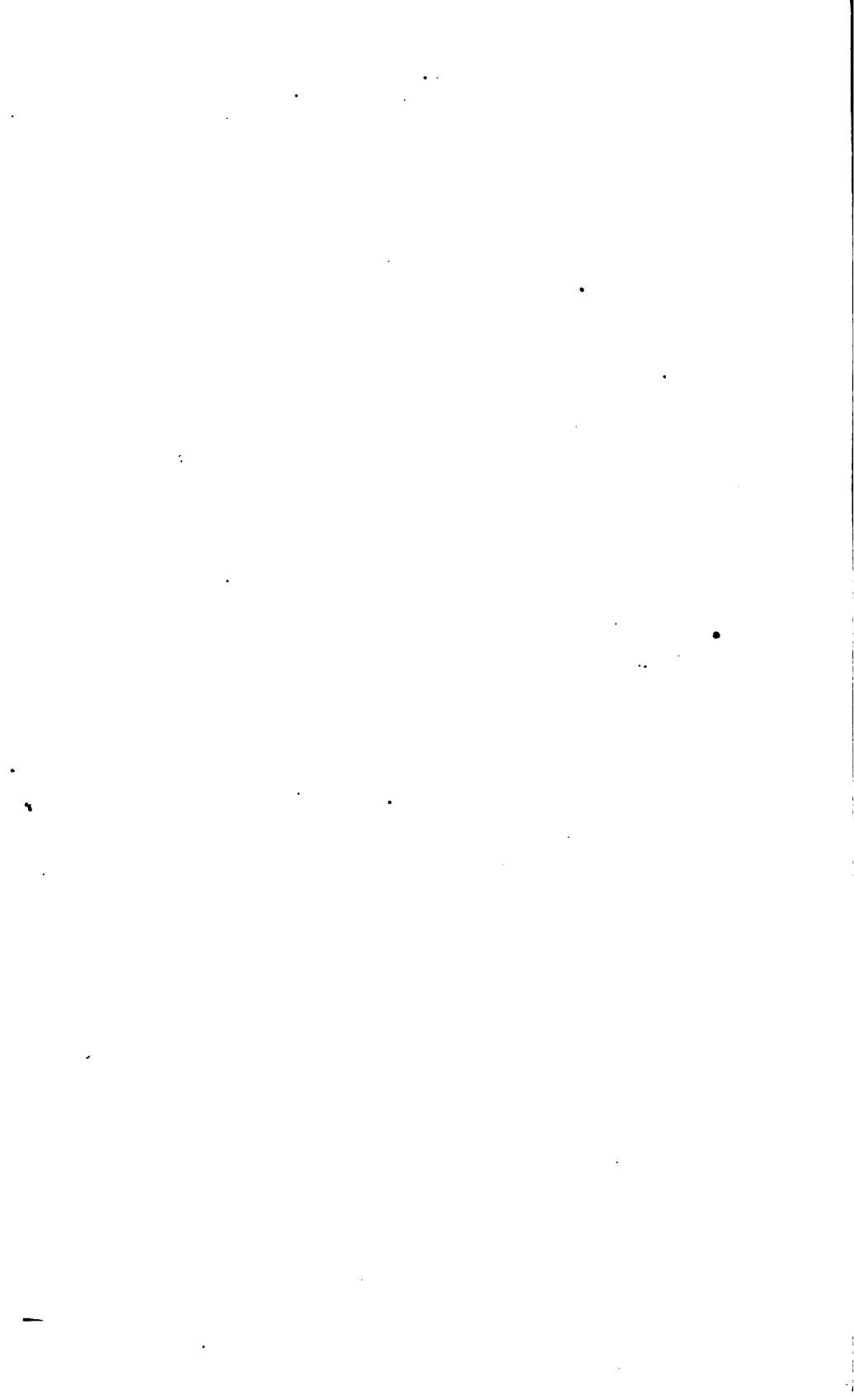
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etc. I do not recollect that this recital was relied upon in the argument, as aiding the case made in the answer; but I allude to it here because the effect of such recitals is discussed in several of the cases to which the attention of the Court has been called.

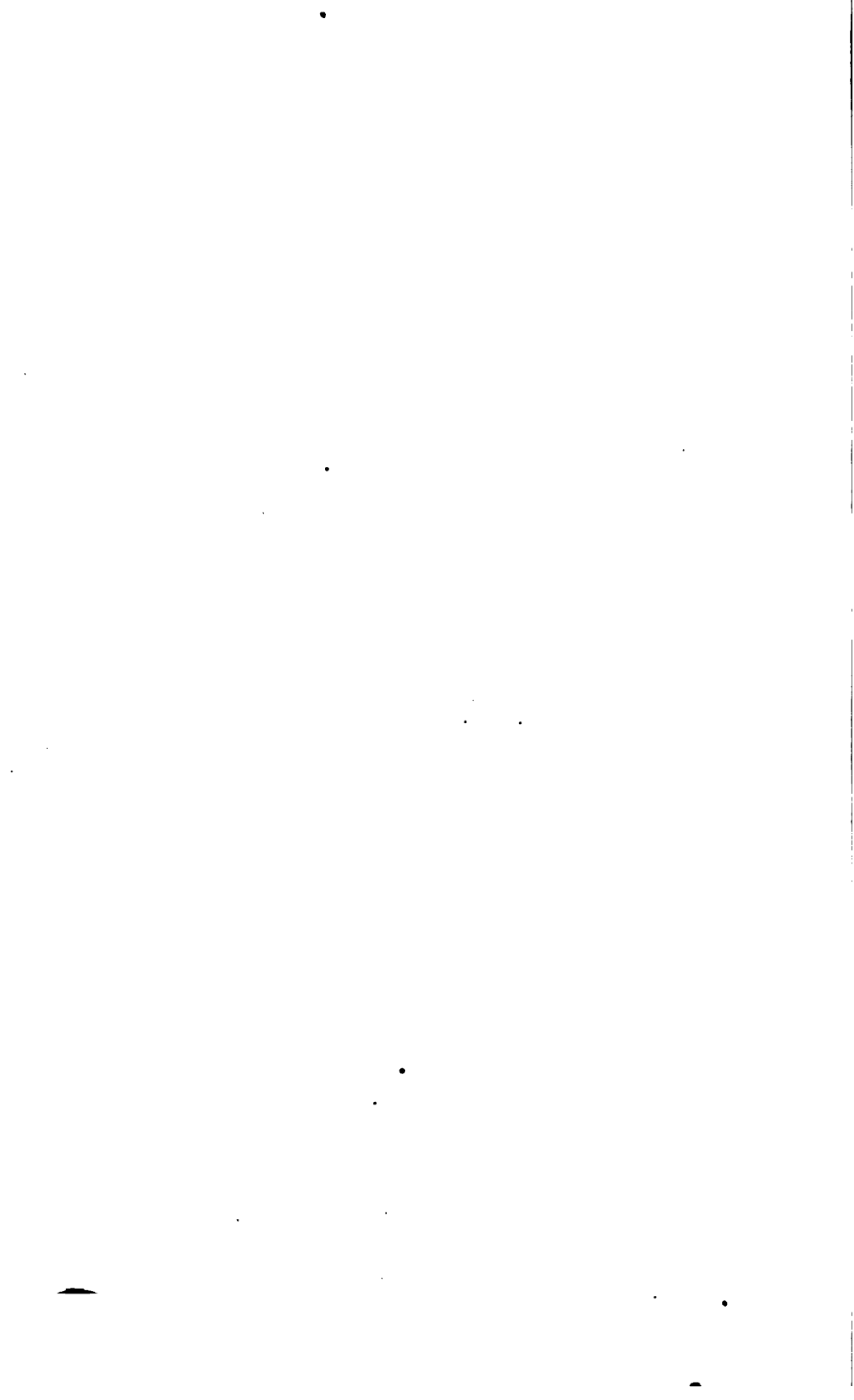
The law applicable to such recitals may be briefly stated to be, that, when the decree recites due service, and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. (*Randall v. Sawyer*, 16 Ill. 27; *Moore v. Stark*, 2 Ohio St. 369; *McMillan v. Reynolds*, 11 Cal. 372; *Braley v. Seamon*, 3 Cal. 610; *Anderson v. Bell*, 9 Cal. 321; *Polard v. Wegner*, 13 Wisc. 569; *Selden v. Wright*, 1 Seld. 497; *Sibly v. Waffle*, 2 Smith, 198.)

The decree and sale should be set aside for want of jurisdiction in the Court rendering it over the persons of the appellants; and a decree of foreclosure rendered against James Heatherly, and the interests of Mary J. Heatherly, in the mortgaged premises, for the amount found due, less the costs of this suit.

NOTE.—The foregoing decision was rendered when the Court was composed of Boise, C. J., and Prim, Wilson and Upton, Justices. It was probably overlooked in the publication of the decisions of the September Term, 1869.



SEPTEMBER TERM, 1870.



REPORTS OF CASES

DETERMINKD IN THE

SUPREME COURT,

SEPTEMBER TERM, 1870.

L. A. SEELY, APPELLANT, *v.* D. SEBASTIAN, JOHN FEASTER, JAMES McCONNELL, NELSON McCONNELL, R. V. SHORT, THOMAS HARRIS AND JESSE V. BOON, RESPONDENTS.

JURISDICTION OF COUNTY COMMISSIONERS.—The Act of 1868, to facilitate the draining of lands in certain cases, only gives to the Board of County Commissioners jurisdiction to locate a ditch where there is none. The Commissioners are not authorized to tap the ditch of an adjoining proprietor and assess damages and benefits to such proprietor.

COMPENSATION FOR TAPPING DITCH ALREADY DUG.—The compensation mentioned in § 8 of the Act for the appropriation of an existing ditch, is in the nature of a contribution, and is distinct from the damages which the Commissioners are authorized to assess for the cutting of a new ditch.

PUBLIC USE.—By public use is meant for the use of many, or where the public is interested.

APPEAL from Clackamas County.

The bill alleges in substance that petitioner is the owner of certain lands in Clackamas County, in what is known as Black Creek Swamp; that some years since, wishing to drain these swamp lands, he obtained the consent of the owners of the lands lying on the natural outlet of these

Argument for Appellant.

swamp lands, to construct a ditch through their lands to drain these lands. That he constructed such ditch at a large outlay, to wit, about \$1800, and extended the ditch from the lands below this swamp through his swamp lands, with side ditches to the main ditch; that respondents own lands lying above his in this same swamp, and which, if drained, must be drained through his (plaintiff's) land, and that in January, 1869, these respondents petitioned the County Court of said county of Clackamas to appoint Commissioners to locate a ditch through the said lands of petitioners to drain their lands. This proceeding was under Act of 24th October, 1868. The Commissioners met and located such ditch, appropriating for that purpose the main ditch of petitioner already dug through his lands, and connecting with the ditch he had constructed through the lands of the proprietors below him on the outlet. They awarded \$100 damages to petitioner, which sum was paid into Court by respondents and was received by petitioner. Petitioner claims that by virtue of the eighth section of the said Act of October 24, 1868, the respondents having tapped and used his ditches are bound to contribute to pay him for the construction thereof a reasonable compensation, which he claims should be in proportion to their mutual benefits derived from its use in draining their lands.

Respondents claim that the award of damages assessed to the petitioner, of one hundred dollars, is the legal compensation intended by the statute.

The bill was dismissed in the Court below and appellant appeals to this Court.

J. H. Stinson, for Appellant.

The statute to facilitate the draining of lands in certain cases (Laws 1868, 21) is in derogation of the rights of private property. It takes an interest or estate in one man's lands and conveys it to another without the owner's consent, and unless such procedure be for the public good, although compensation be made to the owner, the statute is unconstitutional and void. (Const. of Oregon, Art. 1, § 18.)

That the applicant has "land so situated that it requires

Argument for Appellant.

draining," and that some "person or persons owning lands adjacent thereto object to ditches being cut on their land," are jurisdictional facts; and unless they appear upon the face of the petition, the County Court can have no jurisdiction.

The statute being in derogation of the rights of private property, and by it a special power being granted to the County Court, the County Court must pursue the statute strictly, and exercise no power not specially granted therein, and as the statute does not grant to the County Court the power to appoint Commissioners to assess a compensation for ditches already dug, the County Court cannot assume such power. (*Sharp v. Spear*, 4 Hill, 76; *Spear v. Johnson*, 4 Hill, 92; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107.)

In the present case, as the County Court had no jurisdiction to appoint Commissioners, and consequently said Commissioners when appointed had no power to act, the assessment of damages for opening a ditch on appellant's land and the payment of such assessment into the County Court and its reception by appellant conveyed no title or right of easement in appellant's land, but the opening of such ditch upon the land of appellant was a trespass, and the receiving of such assessment of damages by appellant was but a waiver of the damages which appellant might have received in an action at law. (1 Washb. on Real Property, 14; 2 Washb. on Real Property, 24, 25, 27, 37 and 67; *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436; *Gardner v. Mayor of Troy*, 26 Barb. 423; *Allen v. Mayor of New York*, 4 E. D. Smith, 404.)

The statute to facilitate the draining of lands in certain cases (Laws 1868, 21) provides in § 4 that the Commissioners appointed to locate a ditch to be dug by the applicant across the lands of another, in assessing the damages done to the land by the opening and use of such ditch, shall take into consideration the benefits (if any) such ditch will be to the aforesaid lands, and equity following the law, when a ditch is already dug and tapped and of mutual benefit to all parties using it, will enforce contribution under § 8.

Opinion of the Court—Boise, J.

(*Campbell v. Meiser*, 4 John. Ch. R. 334; *Stephens v. Cooper*, 1 John. Ch. R. 425; *Secruneth v. Thompson*, 9 Pick. 31.)

Logan, Shattuck & Killen, for Respondents.

However informal the proceeding in the County Court may have been, and although the Court may even have had no jurisdiction to do what it undertook to do, appellant is, by having received the one hundred dollars paid into Court by respondent under the award of the Commissioners, with full knowledge of what it was paid to him for, estopped from maintaining this proceeding, and especially is he so estopped when he has not refunded the money or offered so to do. (Story Eq. Jur., §§ 1546-1549; 1 Redfield on R. R. 362.)

Independently of any proceeding in Court, treating the Clerk as *agent* for respondent in the payment of the money, we have a written grant of an easement through appellant's land and the right to flow water into his ditch, for a valuable consideration. And to strengthen this view of the matter, this receipt or contract makes special reference to the proceedings of the County Court and of the parties, and must be construed with reference to them. They are a part of the *things done*.

"Drain on land of another is easement and can only be created by deed, although licensee may have spent money and done work." (Gale & Whately on Easements, 12, 14, note 16 and 17; 11 Ill. 164.) The complaint does not state facts sufficient to constitute a cause of suit, entitling plaintiff to an injunction. (37 N. H. 254, and cases cited.)

By the Court, BOISE, J.:

The statute says: "Any person whose land is so situated that it requires draining, and when any person or persons owning land adjacent thereto object to ditches being cut or dug on their land, may make application in writing to the County Court of his county, at a regular session thereof, for the right of way, etc., and privilege to cut a ditch," etc. When this application is made, the County Commissioners' Court shall appoint Commissioners to locate such ditch

Opinion of the Court—Boise, J.

and assess the damages to the owners of the land through whose land the ditch is to be cut—but “in assessing such damages they shall take into consideration the benefit that such ditch will be to the aforesaid lands” through which the ditch is to be cut.

This statute is intended to provide for cutting a ditch where there is none; the work is to be done by the petitioners to the County Court, and it is only in this matter that the Commissioners have jurisdiction. They have no jurisdiction to lay out a ditch over a ditch cut by an adjoining proprietor; and by way of damages, assess the compensation of the owner of the ditch, so appropriated, by tapping his ditch.

This compensation is provided for in the eighth section of the Act, and is distinct from the damages which the Commissioners are directed to assess for the cutting of a new ditch. We think this compensation named in § 8 is in the nature of a contribution, and is a proper matter for a suit in chancery, where all the parties interested in and using the ditch for their common benefit, may be made parties and compelled to pay their equitable share.

It has been insisted that this Act is unconstitutional, as it provides for taking private property for private use (and not for public). We think there is nothing in this point. By public use is meant for the use of many, or where the public is interested.

Suppose a large marsh is situated in such a manner that the miasma arising therefrom affects the public health of a large number of people. To provide for its drainage would be a matter of public concern, and could be regulated by law. So if draining of large swamps would add largely to the area of valuable lands in the State and increase its resources, it would be the proper subject of legislation; and it has been the practice of all States to legislate on this subject, and encourage the drainage of these lands, both as contributing to the public health and agricultural advancement of the country. They are often so situated that their redemption is impossible by private enterprise, and the State may then contribute to that end. Millions of acres of

Statement of Facts.

such lands have been redeemed in this country and in Europe at the expense of government, and we think there can be no question but what our Legislature has this authority, which has been sanctioned by the usage of the whole civilized world.

Judgment will be reversed and a new trial ordered.

SUSANNAH BAMFORD, APPELLANT, v. JAMES BAMFORD, SR., JAMES BAMFORD, JR., AND G. W. MCBRIDE, RESPONDENTS.

DECREE DOES NOT CONFER LEGAL OR EQUITABLE RIGHT TO PROPERTY, WHEN.—

In a suit for a divorce, where the complaint contains no allegations concerning property and the decree contains nothing on the subject, the party at whose prayer the decree is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree.

JUDGMENT ROLL SHOULD CONTAIN A DESCRIPTION.—When real property is transferred from one party to another by a decree granting a divorce, the judgment-roll should contain a description of the land transferred.

INVESTIGATION MUST BE HAD IN THE SAME SUIT.—Although a Court may first pass upon the question of granting or denying the divorce and afterwards investigate and determine the issues concerning property, the subsequent investigation must be had in the same suit.

FINAL DECREE CANNOT BE DISTURBED.—The decree of divorce having become final cannot be disturbed, unless by a suit in the nature of a bill of review. Where one seeks to open a judgment or decree, it should be shown that the party applying is without fault, or that the fault is excusable. It is not a sufficient excuse that the defendant had executed a fraudulent conveyance to a third party before the suit for divorce was begun. The statement of an opinion or conclusion is not sufficient.

AMENDING PLEADINGS.—Discretion in regard to amending pleadings is in the Circuit Court.

APPEAL from Linn County.

The plaintiff having previously obtained a decree of divorce brings this suit to obtain from her former husband, James Bamford, Sr., and his assigns, certain real and personal property. The suit for the divorce was commenced by her in 1869, and in March of that year a divorce was decreed in her favor. It does not appear that the complaint in the divorce suit contained any allegations in regard to

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Statement of Facts.

property, and the decree there rendered does not refer to that subject.

The plaintiff now charges that in January, 1868, her then husband, James Bamford, Sr., owned certain parcels of land which she describes, and certain personal property of the value of \$1430, described in the complaint, and that, knowing that this plaintiff contemplated suing for a divorce for cause then existing, James Bamford, Sr., without consideration, and for the purpose of fraudulently preventing her from obtaining a share of said property by such suit, transferred the property to the defendant, James Bamford, Jr., his son by a former wife. That the said property was thus taken by said Bamford, Jr., in trust for said Bamford, Sr., for the fraudulent purpose aforesaid. That on October 2, 1869, said Bamford, Jr., conveyed said property to the defendant, G. W. McBride, the said McBride having notice of the nature and purpose of the former conveyance. That all said property was acquired by the joint labor of the said Bamford, Sr., and this plaintiff during their marriage. That no provision has been made for her, nor for her four children, the issue of said marriage. That at the time of commencing and prosecuting the said suit for a divorce, "the situation of said property was such that she could not successfully claim and enforce her rights to a share of it in said suit."

It was shown in evidence on the trial, although not specifically alleged in the complaint, that the consideration for the transfer from Bamford, Jr., to McBride was five promissory notes payable to Bamford, Sr., four of them for \$450 each, being payable in seven, nine, eleven and thirteen years respectively, and one of them for \$900, payable in seventeen years, the notes being secured by a mortgage on the premises; and that Bamford, Sr., is still in possession of the said parcels of land.

The appellant asked a decree setting aside the transfers above named as fraudulent; that a partition of said lands be decreed, giving her one-third thereof, and for a decree against Bamford, Sr., for her support.

The Court below denied the relief prayed for.

Argument for Respondents.

F. A. Chenoweth, for Appellant.

It is never necessary, and not always proper, to settle alimony at the time the divorce is decreed. (2 Bish. on Marr. and Div., §§ 497 and 490, and note 4, § 487.) Appellant was prevented by the fraudulent conduct of respondents from procuring alimony at the time the divorce was decreed, and she ought not lose thereby her right to such alimony. (2 Bright. Hus. and W. 360; 2 Story Eq. Jur. 14; 6 Johns. Ch. R. 25.)

When the divorce was granted appellant had (Civ. Code, § 495) a title in and to one-third of the land of respondent Bamford, Sr., and there could be no discretion in the Court as to this third, nor as to the personal property of such respondent, so long as it was covered up. (2 Bish. on Marr. and Div., §§ 514, 524.)

Courts of equity will entertain original jurisdiction in suits for alimony after the divorce suit has terminated. (2 Barb. 377; 2 Bish. on Marr. and Div., §§ 357, 358, 359, 381, 382, 350, 737, 738; 2 B. Monroe, 142; *Galland v. Galland*, Law Reg. Aug. 1870.)

The facts stated are sufficient to entitle the plaintiff to a review and modification of the decree in the divorce suit. (Civ. Code, § 377.)

The prayer for general relief is sufficient. If the complaint was defective, the objection should have been made before the issues of fact were made up. (33 Barb. 238; 6 Barb. 557.)

W. Lair Hill, for Respondents.

1. So far as the plaintiff seeks relief in the nature of a decree of alimony, the relief sought is merely incidental or collateral to a subsisting relation of husband and wife, or a proceeding to dissolve that relation, and was wholly within the jurisdiction of the Court in the divorce suit. (Civ. Code, §§ 496, 497; Bish. Marr. and Div., § 350 *et seq.*)

So, also, might that Court have investigated the conveyances of property, claimed in this suit to have been fraudulent; because such an investigation would have been a

Argument for Respondents.

necessary step in the inquiry concerning the faculties of the husband, which must precede the decree of alimony. And since the Court had jurisdiction in the whole matter, it had power to bring before it all parties necessary to a final determination of all the questions involved. (Civ. Code, § 380; Story Eq. Pl., § 72 *et seq.*)

It is difficult to perceive, upon principle, why a suit for divorce should be an exception to this rule; and we have been unable to find any decision of a case denying its application to such suits. Courts of equity do not administer justice by halves.

2. If the appellant has any title to the land in controversy, she acquired it by virtue of the peculiar statute of this State, and it is a legal title (Civ. Code, § 495, as amended in 1855), and the appellant had a plain, speedy, and adequate remedy at law; for she could bring ejectment for her undivided share. (Civ. Code, § 313; *Carpentier v. Webster*, 27 Cal. 524.)

And in her action of ejectment she could attack the alleged fraudulent conveyances. (*Jackson ex dem. Van Buren*, 18 Johns. 425; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Dallam v. Renshaw*, 26 Mo. 533; *Picker v. Ham et al.*, 14 Mass. 137.)

3. Nor can this suit be maintained as a suit to remove a cloud from appellant's title; for such suit cannot be maintained except by a person *in possession*. (Civ. Code, § 500; *Meade v. Black*, 22 Wisc. 241.)

And for the same reason the case must fall, as to the prayer for partition. (Civ. Code, § 419.)

4. But passing over all these jurisdictional objections, there is no cause of suit stated in the complaint. At the time of the conveyances by Bamford, Sr., appellant had no legal or equitable interest in the premises, except her inchoate right of dower, which was not in any way affected by the transaction. And there is no allegation that the grantee, or even the grantor, had any knowledge that she contemplated proceeding to obtain a divorce. The mere general allegation that the transaction was fraudulent, without specifying the particular circumstances making it fraud-

Opinion of the Court—Upton, J.

ulent, was no sufficient charge of fraud. (*Butler v. Viele*, 44 Barb. 166.)

And even this general charge, the referee finds, is not proved. So that even if the judge of the Court below had not found that the complaint did not state facts sufficient to constitute a cause of suit, the decree must nevertheless have been the same; for there was a trial upon the issues of fact, and the report of the referee (which is the same in this respect as a verdict—Civ. Code, § 226) shows that there was no proof of fraud; and it is well settled that mere want of consideration is not a sufficient ground for setting aside a *bona fide* conveyance. (*Beale v. Warren et al.*, 2 Gray, 447.)

Upon either of these grounds, the suit might properly have been dismissed.

By the Court, UPTON, J.:

The principal questions presented in this case arise from the omission of the plaintiff to present the facts in the suit for divorce and to ask in that suit for the relief now demanded.

Section 495 of the Code, as amended in 1865, is as follows:

“Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall, in all such cases, be entitled to the one undivided one-third part in his or her individual right in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in § 497 of this Act; and it shall be the duty of the Court in all such cases to enter a decree in accordance with this provision.”

The provision is comparatively new, and has not previously been before this Court for construction. It is claimed by the appellant, that the last clause of this section may be complied with, in any case, whether the complaint states facts in regard to property or not, by inserting in the decree a clause, general in its character, to the effect that the prevailing party is entitled to one undivided third part of the real property owned by the other at the time of

the decree. That it is, therefore, no longer necessary to state in the complaint what lands the defendant owns, or that the defendant owns real estate, the Court being in duty bound to insert such clause in regard to real property in every decree by which "a marriage is dissolved or declared void." And that, since equity will treat that as done which ought to have been done, upon the rendition of the decree the party at whose prayer it is granted becomes entitled if not in law at least in equity to one-third the real property of the wrongdoer.

I cannot think this was the intention of the Legislature, and I am unable to agree with the plaintiff's counsel in his attempt to deduce that conclusion from the last clause of the section. If that clause had been omitted the construction contended for would be less difficult to maintain. I think this provision as to the duty of the Court, was intended to prevent such construction, and was added for the purpose of preventing uncertainty and inconvenience to the public which would be likely to result from a mode of adjudication that would leave such indefiniteness in a record affecting the title to real property. If it was the design that granting a decree of divorce should, in every case, have the effect to transfer one-third the real estate of the party in fault, without specifying particular parcels, there would be no necessity for requiring the Court to enter anything in the decree on that subject. The desired result would be produced by the law and not by the formal words entered in the decree. If that is the construction, the last provision may be stricken out without altering the effect of the statute. In an ordinary action, a party becomes "entitled," and it is "the duty of the Court in all such cases to enter" a judgment for the relief to which the party becomes entitled. But if the party permits a judgment, which does not afford all the relief he was entitled to claim in the action, to become final, the party suffers by the omission; and a Court can only grant such relief as is warranted by the facts stated in the pleadings. Since in a divorce suit the Court is required to enter a decree for the property, it does not seem consistent to

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hold that a party obtains property by the suit that is not mentioned in the decree.

The statute, before the amendment, did not provide for transferring real property by means of the decree, to the prevailing party, *in fee*; and it seems to be the leading object of the amendment to provide for making such transfer. As the decree is to have the effect to transfer real estate from one person to another, and is to be one of the muniments of title from its entry, it seems entirely reasonable that it, or the judgment-roll, of which it forms a part, should contain a description of the land thus transferred. And this is necessary if we would make the record in this class of cases analogous to records made in other suits affecting the title to real estate. I cannot doubt but that it was the intention of the Legislature, in making it the duty of the Court "to enter a decree in accordance with this provision," to require as great degree of certainty to be expressed in the record in regard to the particular parcels of property thus transferred as is required in ordinary conveyances. The object of the section as amended is to enable a party to obtain certain rights through the medium of a Court.

To enable the Court to act judicially on the subject of property, it must appear in the complaint that the party has property; otherwise, there being nothing alleged, there is nothing to determine in respect to property, and nothing before the Court upon which to base a decree in this particular. If nothing is stated concerning property, or if, as is frequently the case, for the purpose of affecting the subject of custody of children, it is alleged in the complaint that the defendant has no property (it being in fact true), it can hardly be deemed a case within this section. Certainly, in the latter case, the construction contended for would require the Court to decree concerning that which does not exist, in contravention of the maxim, that the law does not require a vain thing.

If these views are correct, the plaintiff has not acquired either a legal or equitable right to the property by the decree of divorce.

Opinion of the Court—Upton, J.

The authorities cited to show that alimony is not always settled at the time the divorce is decreed, do not go to the extent that is claimed in this case. None of them go further than that the Court may first pass upon the question of granting or denying the divorce, and afterwards, *in the same suit*, investigate and determine the issues concerning property. The present proceeding must be treated as an original suit; the decree in the suit for divorce having become final, cannot be disturbed, nor can any further proceedings be had in that suit, unless by a suit in the nature of a bill of review. The facts stated in this complaint do not authorize the Court to review that decree. It is not shown that the alleged fraud has been discovered since the trial of the divorce suit, nor that the plaintiff has discovered proof since that time. The plaintiff should have shown some sufficient excuse for not claiming the property at that time. When one seeks to open a judgment or decree, it should be shown by a statement of facts that the party applying is without fault, or that the neglect is excusable.

The statement that "the situation of the said property was such that she could not successfully claim or enforce her rights to a share of it in said suit," is relied upon in this particular, and more especially inasmuch as the defendant filed an answer without objecting to the form of the allegation in the complaint. But this statement contains no allegation of fact. There is nothing in it upon which the defendant could, by his denial, present an issue of fact. If the situation of the property is shown, it is shown by other allegations of the complaint and not by this. This simply states the opinion or conclusion that the facts could not be set up in the divorce suit. In other words, it is an attempt to state the law, and I think it states the law incorrectly. As between the plaintiff and her husband, she had a right in her complaint to make an exhibit of her husband's pecuniary condition in order to lay the foundation for obtaining alimony. And if that proceeding raised issues that could not be determined "without prejudice to the rights of others," by § 40 of the Code the Court had power to "cause them to be brought in." And by §§ 242 and 397: "In an

Opinion of the Court—Upton, J.

action [or suit] against several defendants the Court may in its discretion render judgment [or decree] against one or more of them, whenever a several judgment [or decree] is proper, leaving the action [or suit] to proceed against the others."

It necessarily follows either that the wife may proceed against the husband *alone*, in the divorce suit to obtain alimony, on the ground that those who have purchased are not necessary parties, or that she may compel them to appear in that Court to defend. If it be true that their claim to the land is fraudulent and void she would have been entitled, if successful in her suit for divorce, to obtain a share of the land and to have it decreed to her in the divorce suit. If she believed their claims void she had a right to proceed against the husband, treating the land as his property, and if issue was taken on the point whether or not it is the husband's property, no reason can be perceived why that issue may not be tried in a suit for divorce. The question whether third parties claiming as purchasers are necessary parties is not important in this connection. It is sufficient that, if they are necessary parties, they may be joined.

It appears from the transcript that the questions of fact relating to the rights of the parties were investigated on the trial of this cause in the Circuit Court, and it is claimed that defects in the pleadings should be disregarded as not affecting substantial rights. I am of opinion that the defect is such as cannot be disregarded under that rule, and that the complaint cannot be sustained without amendment. The power to permit amendments to pleadings is deemed a discretionary power vested in the Circuit Court. It does not appear that leave to amend has been applied for in the Circuit Court, and it certainly would not be in harmony with the spirit of our system of jurisprudence for this Court to retry the cause upon issues that have never been presented in the Circuit Court.

This Court is clearly of opinion that the facts set forth in the complaint are not sufficient to enable the Court to pass finally upon the merits of the case sought to be pre-

Argument for Appellant.

sented, and that it is not within the province of this Court, upon an application originating here, to permit such amendments as would bring the merits of the case before us for adjudication. It is also thought by a majority of the Court that the contrariety of opinion that has prevailed as to the construction and effect of § 495 of the Code as amended, to some extent excuses failure to apply before trial in the Circuit Court for leave to amend; and since the dismissal of this suit on the ground that the complaint does not state sufficient facts, would leave the real controversy undetermined, and probably open to another proceeding, it is deemed proper, under the peculiar circumstances of the case, to direct the case to be remanded to the Circuit Court for further proceedings, in order that the appellant may apply to the discretion of that Court for leave to amend her complaint.

JOHN TORRENCE, RESPONDENT, v. WILLIAM STRONG,
ADMINISTRATOR OF THE ESTATE OF AMORY HOL-
BROOK, DECEASED, APPELLANT.

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DEFENSE WHEN CANNOT BE DEMURRED TO.—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on motion.

STATUTE OF LIMITATIONS.—A payment by an attorney of the principal or interest on demands collected by him for his client prevents the operation of the Statute of Limitations to bar the client's right of action against such attorney for collections retained by him.

JURY ARE PRESUMED TO FIND.—The jury are presumed to find every material allegation in the complaint in favor of the plaintiff, where a general verdict has been rendered in his favor in the Court below.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

Strong & Trimble, for Appellant.

A part payment of a debt to take it out of the Statute of Limitations must be on account of the particular debt for which the action is brought and must be made only as a part payment of a larger debt. Unless it amounts to an ad-

Argument for Appellant.

mission that more is due, it cannot be regarded as an admission of a still existing debt; and in the absence of conclusive testimony it will not be regarded as an admission of any more debt than it pays. (3 Parson on Con. 67, 69, 71; 2 Greenl. on Ev., § 445; Ang. on Limit., § 244.) The payment of money on an account is no admission of an unsettled account beyond the amount paid. (3 Parson on Con. 67, and note 1.)

The statute (Civ. Code, § 25) fixes the time when the Statute of Limitations commences running in case of payment of *principal* or *interest*, and shows that it has reference to the part payment of a *debt* as contradistinguished from an open or unsettled account. The demand of respondent against Holbrook was not a debt and the payments made by the latter were not payments of either principal or interest of a debt.

Moneys collected on debts of another are not matters of open and running account within the statute. (*Maury v. Mason*, 8 Porter, Ala. 211; 2 U. S. Eq. Dig. 264.) To constitute mutual accounts there must be items within the period limited by statute on both sides of the account. (*Gulick v. Turnpike Co.*, 2 Green, 545; 5 U. S. Dig. 365.) Where one receives several debts of another for collection and collects them at different times, the amounts received on the respective debts are distinct debts from the collector to the owner, and the fact that one debt so collected has been paid to the owner does not prevent the collector from setting up the statute in bar of an action for the recovery of the others; nor will the payment of one debt to the owner constitute an admission of another. (8 Porter, 211; 2 U. S. Eq. Dig. 264.) Where payments on account are made by one party, for which the other gives credit, it is an account without reciprocity, and only upon one side. Payments do not constitute a part of a mutual account. (Ang. on Limit., § 149; 7 Halst. R. (N. J.) 339; *Bennett v. Davis*, 1 N. H. 19; *Kimball v. Brown*, 7 Wend. R. 322; 35 Cal. 122.) Mere disconnected accounts are not such running accounts as will take a case out of the Statute of Limitations. (*Green v. Caldeleugh*, 1 Dev. & Bat. 320.)

Argument for Respondents.

It is contended by respondent that the relation of *trustee* and *c'estui que trust* existed between Holbrook and respondent and that the Statute of Limitations does not apply in such a case. Constructive trusts, resulting from agencies, partnerships and the like, are subject to the Statute of Limitations. (*Farman v. Brooks*, 9 Pick. 243.)

The trusts intended by Courts of equity not to be reached or affected by the Statute of Limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the exclusive jurisdiction of a Court of equity. (*Murray v. Coster*, 20 John. R. 583; *Finney v. Cochran*, 1 Watts & Serg. 112; 5 U. S. Dig. 349; 48 Penn. 518.)

The Statute of Limitations may be pleaded by an attorney in a suit brought against him by his client. (*Hicox v. Hicox*, 13 Barb. 632; 7 Greenl. on Ev. 298; 5 Hill, 398; 48 Penn. 518, 524.) Such action must be brought within six years after the money is received. The fact that a demand was not made within six years before suit is brought will not save the statute. (*Stafford v. Richardson*, 15 Wend. R. 392; 1 Am. Leading Cas. 707; 5 Hill, 398; 31 Ill. 398.)

The Circuit Court has no power to appoint a guardian *ad litem* in the case of lunatics. This control is vested exclusively in the County Court. (Civ. Code, § 869.)

Page & Thayer, for Respondents.

The facts set out in the complaint show that the statute could not have run and the plea admits those facts. (Strong Eq. Pl., § 754.)

Pleadings in such cases should conform to equity pleadings at common law. (36 Barb. R. 628; 19 Cal. 476.)

The transaction described in the complaint was in the nature of a continuing trust, and the statute would not begin to run until after a demand was made. (19 Cal. 173; 7 Wend. R. 322; 5 Barb. R. 585; 5 Hill, § 398; 2 Sandf. R. 142; 36 Barb. R. 662; 39 Barb. R. 634; Ang. on Limit. 170, 175, 176, 177.) Defendant's liability was upon an existing contract upon which partial payments had been made, and in such cases the period of limitation is from the time those payments are made. (Civ. Code, § 3.)

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The plaintiff's plea, if true, is still no bar. He says the cause of action and each of them "accrued" to the plaintiff more than six years before the death of said Holbrook and the commencement of this action. This is bad in form. (Ang. on Limit. 303; 2 Hill, 59; 15 Pick. 302; 20 How. U. S. 149.) But if correct in form the action may be maintained, as having accrued only from the time of the presentment of the claim and the refusal of the administrator to allow it. (27 Cal. 274.)

By the Court, THAYER, J.:

This is an appeal from a judgment recovered in the Circuit Court, Multnomah County. It was an action to recover money. The plaintiff, John Torrence, alleged in his complaint that Amory Holbrook died intestate on the 26th day of September, 1866, and that William Strong was, on the 1st day of October, 1866, duly appointed his administrator and had duly qualified, etc., and as such administrator was made defendant.

It was also alleged that on the 30th day of November, 1858, in the lifetime of said Holbrook, the plaintiff retained and employed him, as his general attorney, for certain fees and rewards, to do and perform such business appertaining thereto as plaintiff might thereafter request, and that said Holbrook undertook and promised to fulfill his duty in relation thereto. That said Holbrook, in pursuance of such retainer and employment, received for collection certain notes and obligations belonging to plaintiff and which were placed in his hands. That a part of the notes, etc., Holbrook has returned to plaintiff; others he had collected, a part of the proceeds of which he had not paid over. The plaintiff filed with his complaint an exhibit which he alleged to be a correct statement of the transactions, in which he charged Holbrook for the notes delivered and moneys collected thereon and money placed to his credit, and credited him with the notes returned and moneys paid over, and which contained the dates of the several transactions. Plaintiff also alleged that there was a balance due him thereon of \$4606.26, and that he had regularly pre-

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sented the claim to the defendant as administrator and payment had been refused by him.

The defendant filed an answer denying some of the allegations in the complaint; also claimed payment; admitted the payments credited Holbrook in complaint; set up certain counter claims, and interposed as a defense the Statute of Limitations.

Plaintiff demurred to the defense or plea of the Statute of Limitations, and the Circuit Court sustained the demurrer; he then filed a reply denying the other matters of defense and counter claim set forth in the answer.

The case afterwards came on for trial before the Court and a jury duly empaneled. When the cause was called for trial, the defendant filed an affidavit setting forth that the plaintiff was insane, and insisted that the trial should be postponed. The plaintiff's counsel thereupon applied to the Court for the appointment of a guardian *ad litem* for plaintiff, and the Court appointed one accordingly. The trial then proceeded, and the jury returned a verdict of \$3092.62 in favor of the plaintiff, upon which judgment was afterwards entered against the defendant generally, with costs of action.

The appellant claims that the judgment of the Circuit Court is erroneous in several particulars, which he specifies in his notice of appeal. They are principally as follows:

That the complaint does not contain facts sufficient to constitute a cause of action;

That the Court erred in sustaining the plaintiff's demurrer to the part of the defendant's answer which avers as a defense the Statute of Limitations;

That the Court erred in rendering judgment generally against the defendant; and,

That the Court erred in proceeding to try the action when it appeared that the plaintiff was insane.

Only two of the points assigned as error were earnestly insisted upon in the argument, and in the opinion of this Court they are the only questions in the case that raise any doubt as to the legality of the proceedings in the Court below. The complaint unquestionably contains facts suffi-

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cient to constitute a cause of action, and we can see nothing in the question regarding the insanity of the plaintiff which can affect the judgment. Questions of that character must be raised by a plea in some form. The defendant certainly could not take advantage of it by objection or motion. The order appointing a guardian *ad litem* was an unnecessary proceeding, and perhaps not warranted by law, but it could not have affected any substantial right of the defendant. The question of plaintiff's insanity was not really before the Court, and when suggested in the proceeding should have been disregarded.

The defendant's plea of the Statute of Limitations was not demurrable; as a matter of strict legal right, the defendant was entitled to the plea.

The Code provides that a defendant may set forth by answer as many defenses and counter-claims as he may have; and when a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be got rid of by demurrer.

It may be stricken out on motion if false, but cannot be demurred out. The respondent's counsel, however, insists that it affirmatively appears that the plaintiff's cause of action was not barred by the Statute of Limitations, and that if the defendant's plea of the statute had been permitted to stand it would not have availed him. There has been no statement or bill of exceptions in the case returned, and this Court can only examine the ordinary record proceedings.

It appears from the complaint that the plaintiff's cause of action arose out of the contract made with Amory Holbrook, November 30, 1858; that at that date the plaintiff placed in Holbrook's hands, who was an attorney-at-law, the notes and obligations referred to, and had deposited with W. S. Ladd & Co., bankers, \$1500 gold coin, to the credit of Holbrook, which had been drawn and used by him.

That Holbrook had, from time to time, between that date and the time of his death, returned to plaintiff certain of the obligations, and paid him certain sums of money in payment of the proceeds of the obligations collected by him,

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the last of which payments was made by him on the 14th day of April, 1866. The defendant in his answer admits the payment of the money and return of the obligations. The language of that part of his answer is as follows:

“That he does not deny that said Holbrook paid over and deposited to the use of the plaintiff the money, notes, etc., credited to the defendant in the complaint, amounting to \$3565.75, besides the Abernathy & Co. notes, and also \$300, which plaintiff admits was paid April 14, 1866, but says the amount was \$500,” etc.

Hence, taking the complaint and answer together, this Court is of opinion that the Statute of Limitations had not run when the action was commenced, to wit, on January 10, 1868. A payment in such case of principal or interest prevents the operation of the statute until the full time has elapsed after the payment. (Civ. Code, §§ 24, 25.) The plaintiff, under the circumstances, had six years after the payment in which to commence the action. We are unable to perceive how the defendant could have been benefited by the plea in question.

The jury are presumed to have found every material allegation in the complaint in favor of the plaintiff, and would have been compelled, as the issues were framed, to find that the payments had been made by Holbrook, as credited in the complaint, and could not have found that the Statute of Limitations had run, if the issue tendered upon that point had been tried. The rule is that an error in the Court below, which on its face and by legal necessity could do no injury, is not cause for reversing a judgment. We think the error in this case comes within the principle of this rule.

That, under the circumstances, it was only technical and could not have prejudiced the defendant, and is, therefore, no cause for reversing the judgment.

The judgment, however, as entered, was irregular. It should have been entered against William Strong, as administrator of the estate of Amory Holbrook, so as to establish the claim of Torrence against said estate for the amount of the judgment and costs recovered in the Circuit Court. The judgment must be modified in that particular; in all other

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respects it is affirmed. But the appellant is entitled to recover the costs of this Court.

The case is remanded to the Court below for further proceedings, in accordance with the foregoing decision.

Mr. Justice McARTHUR did not sit in the cause.

JOHN A. JOHNS, APPELLANT, v. MARION COUNTY,
RESPONDENT.

RETURN FORMS PART OF JUDGMENT ROLL.—The return made in obedience to a writ of review forms part of the judgment-roll, and is properly included in the transcript without a statement or bill of exceptions.

MUST SHOW JURISDICTION.—The return should show that the tribunal had jurisdiction. It is a general rule that Courts of limited and general jurisdiction, when exercising a special limited power, conferred by statute, must show affirmatively that jurisdiction has been acquired.

PETITION AND PROOF OF NOTICE NECESSARY TO GIVE JURISDICTION.—The County Court is a Court of record, but its general jurisdiction is to be defined, regulated and limited by law. The statute prescribes its powers and its mode of proceeding in laying out roads. It has no power over the subject until the prescribed petition and proof of notice is presented.

IRREGULARITIES THAT GO TO THE JURISDICTION.—The rule that a judgment should not be reversed for errors not affecting a substantial right, does not apply to irregularities that go to the jurisdiction of the Court.

MUST DESCRIBE TERMINAL POINTS.—A petition for the alteration of a road that does not describe the terminal points with certainty, is insufficient to give the County Court jurisdiction.

APPEAL from Marion County.

The appeal is from a judgment of the Circuit Court dismissing a writ of review and affirming the action of the County Court of Marion County in the matter of a petition for an alteration of a road.

It appears from the return made in obedience to the writ of review, that on the 9th of March, 1870, a petition, signed by twelve persons, was filed in the County Court, the petition being in the following form:

“To the Honorable County Court of Marion County, Oregon:

“The undersigned, your petitioners, would respectfully re-

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4	307
5	283
5	286
6	121
17	282
17	323
17	323
20	444
20*	325
21*	51
21*	52
26*	307

4	46
24	409
33*	982
4	46
27	321

4	46
30	336
30	341
30	342

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35	175

4	46
38	542

4	46
38	317

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quest your honorable body to take such steps as would lead to the opening of a county road, to commence at a point on the stage road north of the residence of D. A. Miller, to run thence west to the flour mill of Moores, Witten & Miller, thence southerly to intersect the county road near the foot of the Nevil Hill, near the south line of John A. Johns' land claim; also, to vacate the old road from the intersection near the Nevil Hill to its intersection with stage road north of John Crimes."

On the same day, one hundred and twenty-eight persons, styling themselves "householders living in the vicinity" of said road, filed their remonstrance against the alteration of said road. Thereupon a supplemental petition in favor of the proceeding was filed, containing additional names.

The appellant moved the County Court to strike out the supplemental petition; and thereupon the County Court made an order directing "both the petitioners and remonstrators to procure new and additional signers for or against said road," and continued the cause. Other supplemental petitions and remonstrances were afterward filed; and in May, 1870, the proposed road having been viewed and surveyed, the County Court made an order locating the proposed road, but made no order granting the proposed vacation. Among the many assignments of errors are the following:

1. The petition and notices were defective in not specifying the place of beginning and of termination.
2. Posting one notice at the court-house, one on the proposed road and two on the road proposed to be vacated, was not a compliance with the statute.
3. It is not competent, in the same proceeding, to vacate one road and locate another, the termini of the two not being common.
4. Permitting a supplemental petition to be filed.
5. Granting the petition in part and not in whole.
6. Persons were counted as petitioners who were not householders of the county or residents of the vicinity.

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B. F. Bonham and G. W. Lawson, for Appellant.

Williams & Willis, for Respondents.

By the Court, UPTON, J.:

This case was presented in the Circuit Court by a petition for a writ of review. The transcript presents the petition, the writ and the return made by the clerk of the County Court.

The respondent makes a point of objection to reviewing the proceedings of the Circuit Court; that there is no statement of the case or bill of exceptions; that the return to the writ is evidence and not a pleading, and consequently cannot be regularly embodied in the transcript, unless in the form of a statement or bill of exceptions.

The return of an officer, properly made in obedience to a writ of review, forms a part of the record. The statute which directs the manner of making up the judgment-roll does not mention this particular class of returns by name, but since the return is the only means by which issue can be taken upon what is alleged in the petition, unless it is treated as a pleading in preparing the judgment-roll in pursuance of § 269 of the Code, it would be impossible to make up an intelligible record. At common law, the return brought up only the record (*People v. Vermilyea*, 7 Cow. 108), and the record was reviewed only upon questions affecting the jurisdiction. Where the office of the writ has been enlarged by statute, so as to authorize a review for error, as well as for irregularity affecting the jurisdiction, it sometimes becomes necessary to embody in the return matters that are not part of the record in the strict sense of the term, in the tribunal to which the writ is directed. But by being embodied in the return, they become necessarily a part of the record of the Court in which the return is filed, and are so treated. (*Morewood v. Hollister*, 2 Seld. 309.) The return is properly made a part of the transcript in this case.

It is not sufficiently full to enable either the Circuit Court or this Court to pass upon all the questions suggested in

the assignment of errors. For instance, the return does not disclose what course was taken to ascertain who of the petitioners and remonstrators were householders of the county, residing in the vicinity; nor what was decided in regard to any one or more of them. But, under the view taken by this Court, it will be unnecessary to pass upon all the points that are presented by the record. The case turns upon the question whether the County Court had acquired jurisdiction. "The return should show that the tribunal had jurisdiction." (*Starr v. Trustees of Rochester*, 6 Wend. 564.) It is a general rule that Courts of limited jurisdiction, and Courts of general jurisdiction when exercising a special limited power conferred by statute, must show affirmatively that jurisdiction has been acquired. When this is shown, error will not be presumed, but must be affirmatively shown. (*Stanton v. Ellis*, 2 Kern. 575.) The sound rule in regard to such tribunals is, "to be liberal in reviewing their proceedings as far as respects form, and strict in holding them to the exact limits of jurisdiction prescribed to them by the statute." (*Jones v. Bird*, 1 Caine R. 594.)

The County Court is a Court of record, but its general jurisdiction is to be defined, limited and regulated by law in accordance with the Constitution. Besides the general jurisdiction in specified matters conferred directly by the Constitution, it may exercise other powers to be prescribed by law. The statute (General Laws, p. 857) prescribed its powers and its mode of proceeding in laying out, altering or locating county roads. Under the statute, the Court has no power over the subject until a petition of the prescribed character and proof of notice is presented, and it is necessary that the record should show affirmatively that jurisdiction has been thus acquired, or the proceeding cannot be sustained.

One of the requisites of the petition is, that the petition should "specify the place of beginning, the intermediate points, if any, and the place of termination" of the road.

It is the opinion of the Court that the petition presented in this case does not comply with this requirement of the

Opinion of the Court—Upton, J.

statute. The language used to define the point of beginning is susceptible of two constructions, one of which leaves the point indefinite. If we assume, in aid of the record, that "Stage Road" is a proper name, applied to a particular road, and that there is but one stage road in the vicinity, it may be inferred that the word "North" is used to signify that the point of beginning is in that road and directly north of D. A. Miller's dwelling-house. But the description of the place of termination is entirely too indefinite to be deemed a compliance with the statute. The last course and the point of termination are described by the words, "thence *southerly* to intersect the county road *near* the foot of the Nevil Hill *near* the south line of John A. Johns' land claim."

It is evident from the provisions of the statute that the Legislature intended the petition and notice should place the proposed enterprise before the public in a manner to enable parties interested to ascertain, from an examination of the petition, how their interests would be affected by the proposed change. This intent of the Legislature cannot be carried out if a petition is worded so vaguely as to make the selection of the particular route a subject of future determination. There is nothing in the petition by which the point of termination can be rendered certain, no matter what geographical facts are assumed as being within the knowledge of the Court, because it is impossible to tell how near to Nevil Hill or the south side of the land claim the point of termination is to be.

The proposed vacation not having specified *termini* common with those of the proposed new road, does not aid the description of the latter.

It is true that it does not appear on the record that any one was misled; for aught that appears, every person interested may have known from other sources precisely what alterations were intended, but the sufficiency of the petition is a question that affects the jurisdiction, and until a sufficient petition is presented in such a case, the County Court acquires no power over the subject. (*Staple v. Fairchild*, 3 N. Y. 41.)

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If the vagueness of description had occurred in some proceeding after the Court had acquired jurisdiction, it is possible the presumption of regularity might prevail, notwithstanding the defect, or the Court might be justified in sustaining the judgment on the ground that it should not be reversed for mere error that is not shown to have affected a substantial right, but there is no such rule applicable to defects that go to the jurisdiction of the Court, because in a Court of limited jurisdiction there is no presumption in favor of the regularity of the proceedings until it is shown that jurisdiction has been acquired. (*Turner v. Bank of North America*, 4 Dallas, 8; *Bigelow v. Stearns*, 19 John. 39.) And even if we could apply a more liberal rule and hold that there is a presumption that a cause is within the jurisdiction of the County Court until the contrary appears, it would not avoid the difficulty, for it affirmatively appears by the record that the Court assumed to act upon this petition. And yet the Court had no power to act until such petition is presented as the statute designates. (*Bloom v. Burdick*, 1 Hill, 140.)

The question is raised whether the appellant, who filed a claim upon which damages were awarded in his favor by the County Court, can object to the jurisdiction. If he had received and accepted the award the proposition would be of more force. His disability to make the objection must be either because it would be inequitable to permit him to allege the truth, or because by his action in the County Court jurisdiction was acquired. It will not be claimed that he is estopped, he not having accepted the award, and personal appearance in a case of this kind does not confer jurisdiction. The County Court can only acquire jurisdiction in the particular mode pointed out by statute, and a question to the jurisdiction is not thus wavered. (Civ. Code, § 70.)

Where such irregularities are discovered, pending a proceeding to lay out a road, it is better that the error should be obviated by commencing anew than that the matter should be left to embarrass the county after public funds have been expended in constructing the road.

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It is not necessary in this case to pass upon the other objections to the petition and notice, nor upon the validity of the subsequent petition, or the regularity of granting the order to lay out without the words to vacate.

The judgment of the Circuit Court should be reversed for want of jurisdiction in the County Court.

S. C. STONE, RESPONDENT, v. THE OREGON CITY MANUFACTURING COMPANY, APPELLANT.

CONTRIBUTORY NEGLIGENCE.—A person employed to work with or around dangerous machinery, is bound to exercise his thinking faculties and give careful attention as to how he passes around it; and if he fail to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury.

RESPONSIBILITY OF AN EMPLOYER.—An employer who provides machinery and controls its operations, must see that it is suitable; and if an injury to the workmen happen by reason of defect *unknown* to the latter, and which the employer by use of ordinary care could have cured, such employer is liable for the injury.

EMPLOYEE TAKES THE RISK INCIDENT TO HIS EMPLOYMENT.—If an employee works with or near machinery which is unsafe, and from which he is liable to sustain injury by reason of its condition, he takes the risk incident to the employment, and cannot maintain an action against his employer for injuries sustained by reason of the defective condition of the machinery.

APPEAL from Clackamas County.

This was an action to recover of appellant, a corporation, damages sustained by respondent while engaged in performing certain work in appellant's woolen mills at Oregon City.

The complainant alleges that he was injured in consequence of the negligence of appellant in allowing a portion of the machinery of the mill to be in an unsafe and insecure condition, of which appellant had notice.

The answer denies the allegation of negligence and notice, and claims that respondent was injured in consequence of his own negligence.

These issues of fact were submitted to a jury, and a verdict returned in favor of respondent in the sum of \$5000.

The circumstances of the injury were substantially as fol-

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Statement of Facts.

lows: The respondent and one Newell, a laborer who had previously worked at the business, were engaged in carrying rolls of wet cloth from a machine called an extractor, to the outside of the building to a hoisting apparatus. In passing from the latter place to where the rolls of wet cloth were, they had to pass through a passage-way, on one side of which were the extractor and shaft propelling it, and on the other side of the passage was a fan and a shaft upon which the fan revolved. The fan was used for drying wool, and revolved about seven hundred times per minute, running in such a manner as to present the appearance of an object at rest. The extractor was less rapid in its revolutions than the fan, but ran with much more noise, and in a manner much more likely to attract the attention and excite the fear of one not familiar with such machines. This passage-way was about four and a half feet in width.

After he had been employed in this business about two days, respondent was passing in from the hoisting apparatus, to the back side by the extractor, through this passage-way between the two machines, having under his right arm, on the side next to the extractor, his hand-barrow; and in his left hand, next to the fan, a handful of ropes used in binding rolls of cloth together for hoisting. Both of these machines were in motion at the time. As respondent was thus passing along, the rope he was carrying caught and wound around the shaft of the fan and he was suddenly drawn down and wounded in his hand and arm, so as to make amputation just below the elbow necessary. The shaft of the fan was not boxed. There was evidence tending to show that respondent had seen the shaft of the fan immediately before the accident and knew that it was revolving with great rapidity; that he was not thinking of it and was not conscious of danger. There was also evidence tending to show that respondent's attention had been called to the danger that existed from the shaft by a fellow-operative, some time prior to the accident, and that if he had wound up the ropes into a closer body, or had lifted them a little higher, they could not have caught on the shaft.

Opinion of the Court—Prim, C. J.

Logan & Shattuck, and Johnson & McCown, for Appellant.

The plaintiff was not relieved from the duty of exercising ordinary prudence, though defendant was guilty of negligence. (*Baxter v. Troy & B. R. R. Co.*, 41 N. Y. 502; *Hunt v. Erie R. R. Co.*, Id. 296.) Plaintiff must not only prove negligence on the part of defendant, but ordinary care and diligence on his own part. (26 Ill. 373; 20 Ill. 478; 12 Pick. 177; 13 Ill. 585; Am. Law Reg., Mar. 1869, 154.) If defendant knew the character and position of the machinery, and could have avoided danger by raising the rope he was carrying, but did not do so because he did not think, he is guilty of negligence, and cannot recover. (6 Iowa, 443; *Hanlon v. City of Keokuk*, 7 Iowa, 488; *P. & C. R. R. Co. v. McClurg*, Am. Law Reg., Mar. 1868, p. 277; *Railroad v. Evans*, 3 P. F. Smith, 225.)

S. Huelat and Benton Killen, for Respondent.

In actions of this kind, it will depend on the circumstances of each case whether the plaintiff must show affirmatively that he was not guilty of negligence. His freedom from fault may be inferred from circumstances. (20 N. Y. 65; 5 N. Y. 21; 19 How. Pr. R. 370; 34 Cal. 153.) An employee who knows nothing of the dangers of the business in which he is engaged has a right to rely upon the superior knowledge of his employer, and upon his care and prudence that he will insure him against all harm. (41 Barb. 367; 13 Pick. 98; 6 Allen, 39; 8 Allen, 441; 10 Gray, 274; 15 U. S. Dig. 401.) It is sufficient if it is fairly inferable from all the facts and circumstances in the case that the plaintiff was free from negligence contributing to the injury. (35 N. Y. 9, 10, 39, 40, 41; 8 Minn. 154; 40 Barb. 193, 211; 20 N. Y. 65, 73, 76; 22 N. Y. 209; 6 Iowa, 453.) The Court has no right to instruct the jury that a particular fact constitutes negligence. (40 Me. 151.)

By the Court, PRIM, C. J.:

At the trial of this case, the Court below was asked by appellant's counsel to instruct the jury "that if they be-

lieved from the evidence that respondent Stone knew the position and character of the machine by which he was injured, and could have avoided all danger by raising the ropes which he was carrying a few inches higher, and did not do so because he did not think, then respondent was guilty of negligence, and cannot recover."

In refusing this instruction, we think the Court below erred. The respondent having been injured while engaged in the performance of certain work in the woolen mill of appellant, which required him to pass constantly around and about the machinery thereof, it was his duty to exercise ordinary care and watchfulness in doing so.

The degree of care necessary to be exercised by an employee in working with or around such machinery, should be proportional to the danger usually and necessarily incident to the particular work being performed.

There is very little machinery in a woolen mill but what is dangerous to careless and thoughtless operatives; consequently, we hold that it was the duty of respondent while engaged in working in the vicinity of such machinery to exercise his *thinking faculties*, and give careful attention to the business in which he was engaged. If he failed to do so, and was injured in consequence thereof, it was such negligence as contributed to his own injury and would prevent his recovery in this action. This proposition is sustained by the following authorities: *The Pittsburg & Connellsville Railroad Co. v. McClurg*, decided Jan. 7, 1868, in Supreme Court of Penna., reported in Am. Law Reg., Mar. 1868, p. 277; *North Penn. R. R. Co. v. Hulman*, 13 Wright, 60; *Railroad v. Evans*, 3 P. F. Smith, 255. The last was a case of injury because the plaintiff did not "think or look," and was unconscious of danger. The Court says, "On approaching the road it was his duty to look and listen for an approaching locomotive, and if he saw or heard one coming, to get himself out of the reach of it. * * "If he might have heard or seen the train approaching, or if he saw it and mistook the track it was on, it was negligence in him not to exercise his senses correctly and place himself out of danger." (See, also, *Rush v. City of Davenport*, 6 Iowa,

443; *Mobile & Ohio R. R. Co. v. Thomas*, reported in Am. Law Reg., March, 1869, p. 154.)

The Court below was also asked by counsel for appellant to instruct the jury that "if they were satisfied from the evidence the machine in question was in the same condition at the time of the accident that it was in at the time plaintiff commenced work for appellant, and that the danger was open and readily discoverable by an ordinarily careful person, the jury may take that fact as evidence that the risk assumed by respondent was such as was incident to the employment in which he was engaged. This instruction the Court refused to give as asked, but modified the same by adding the following: "But if the machinery was of itself improper, or improperly placed by the defendant's neglect, and that impropriety or neglect caused the injury, the plaintiff will not be presumed to have contracted to work with and take the risk of improper machinery."

We think this instruction should have been given as asked, because the evidence reported in this case tends to show that the "machine in question was in the same condition at the time respondent commenced work for appellant that it was in at the time of the accident; and also, that respondent knew the position and character of the machine, or at least had the means of such knowledge. It was in open, plain view, and respondent had been working in its immediate vicinity for two days prior to the happening of the accident. It also appears that the attention of respondent had been called to this machine prior to the accident, by one of the operatives.

The general rule, which is well established by all the cases on this subject, is "that an employer who provides the machinery, and oversees and controls its operations, must see that it is suitable; and that if an injury to the workmen happen by reason of a defect *unknown* to the latter, and which the employer by the use of ordinary care could have *cured*, such employer is liable for the injury." Hence, under this rule it will be seen that it does not necessarily follow, that the employer is liable to his employee for every injury which he may sustain by reason of defective

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or improper machinery. But his liability depends, first, upon the fact whether the defect is such a one as could have been cured by the "use of ordinary care" by the employer, or by those appointed by him to superintend and control the machinery; and, secondly, upon the fact whether *such defect was "unknown"* to the employee. By a careful examination of all the authorities, it will be seen that this rule is not only well established, but they go still further, and hold that the employee is accountable for his *means of knowledge*. *McGlynn v. Brodie*, reported in 31 Cal. 376, is a very ably considered case, and that, and the cases cited and reviewed by the Court in delivering the opinion, fully sustain the proposition.

The case in California is very similar to the one under consideration. The plaintiff had been engaged in working in the vicinity of a dangerous piece of machinery called a "cupola," in repairing it, and after he had been so engaged for two days, it fell down and injured him. The Court held that he could not recover of the owners for the injury sustained, on account of his knowledge of the condition of the machinery at the time. The Court says that "when a party works with or in the vicinity of a piece of machinery insufficient for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from the defective condition of the machinery." (*McGutrick v. Mason*, 4 Ohio St. R. 569; *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 558; *Williams v. Clough*, 3 Hurl. & Norris, 258; *Griffiths v. Gidlow*, Id. 648; *Dynen v. Leach*, 40 E. L. and E. 492; *Skipp v. Eastern Co. Railway Company*, 9 Ex. 223; Story on Agency, sixth edition, § 453, and notes and cases cited.)

The Court below, in refusing the instruction last referred to, refused to submit to the jury the question of fact, whether the respondent had knowledge or the means of knowledge of the dangerous condition of the machine in question at the time of the accident. If this machine was

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improperly set up through the carelessness of appellant, or those employed to manage and superintend the work, and respondent was injured in consequence thereof, the only other question of fact to be ascertained in order to fix the liability of appellant, was whether the dangerous condition of the machine was unknown to respondent. That was a question of fact which should have been submitted to the jury, as it appears there was some evidence on that point.

The refusal of these instructions may have prevented a verdict in favor of appellant in the Court below. Therefore, the judgment is reversed and the case remanded to the Court below for a new trial.

R. H. DEARBORN, ADMINISTRATOR OF THE ESTATE OF
R. E. STRATTON, DECEASED, APPELLANT, v. JAMES
J. PATTON, JOHN C. SMITH AND D. C. UNDER-
WOOD, RESPONDENTS.

FILING TRANSCRIPT OF JUDGMENT.—Where a judgment was obtained before a Justice of the Peace for more than ten dollars, exclusive of cost, under the statutes of 1855, it was necessary to file a *certified transcript* of such judgment in the office of the Clerk of the District Court in the county where the judgment was rendered, in order to acquire a judgment lien upon real estate. Filing a *mere abstract* of such judgment is a failure to meet the requirements of the statute.

APPEAL from Douglas County.

This suit was commenced by the administrator of the estate of R. E. Stratton, to foreclose a mortgage executed by Patton to secure the payment of a certain promissory note given by him to Stratton for \$591 and interest. Smith filed a separate answer, in which he claims to be the assignee of a judgment against Patton in favor of Marks & Co. for \$69.50, with interest at two per cent. per month from June 17, 1869, and that a certified transcript of this judgment was filed in the office of the Clerk of the District Court of Douglas County, on the 5th day of July, 1861, and was then and there entered in the judgment docket of said Court, by virtue of which it is claimed it then and there became a lien

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upon the land embraced in the mortgage to Stratton. These allegations were denied by the replication. A certified copy of the Justices' docket was read in evidence, and also a paper purporting to be a certified transcript of the judgment on file in the Clerk's office under which the judgment lien is claimed, which paper consisted of a statement of the title of the cause of *Marks & Co. v. Patton*, with an entry thereunder as follows:

"Judgment rendered for the plaintiff against the defendant, June 17,	
A.D. 1861, for.....	\$58 90
Cost.....	9 95
<hr/>	
Total amount.....	\$68 85
Fee for transcript, to be added.....	75
Interest on judgment at two per cent. per month."	

The other transcript of the Justice's docket, read in evidence, shows that a complaint was filed and summons issued, returnable on the 17th day of June, 1861; that Patton appeared on that day before the Justice and confessed judgment for the amount demanded in the complaint; and that judgment was duly entered in the docket of the Justice for the amount and costs of suit, which were taken up by items. Nothing appears in this transcript about interest. The Circuit Court held that respondent Smith had a valid subsisting judgment lien on the mortgaged premises, and that it was prior to that of appellant.

Williams & Willis, for Appellant.

W. R. Willis and J. F. Watson, for Respondent.

By the Court, PRIM, C. J.:

One of the respondents (J. C. Smith) in this appeal is the assignee of a judgment rendered in Douglas County by a Justice of the Peace in favor of the firm of *S. Marks & Co. v. J. J. Patton*, for sixty-nine and fifty hundredths dollars. The only question here is, did this judgment become a lien upon the land embraced in the mortgage executed by Patton to R. E. Stratton; because if it became a lien at all

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there can be no question but that it was prior in time to that of the mortgage.

We think it did not become a lien upon the land in question, for the following reasons: Under the statute in force at the time this judgment was rendered, any person obtaining a judgment in his favor before a Justice of the Peace for more than ten dollars exclusive of cost, and wishing such judgment to become a lien upon the real estate, was required to file a certified transcript of such judgment in the office of the Clerk of the District Court of the county in which the judgment was rendered. The statute then provides that "every such judgment from the time of filing the transcript thereof shall have the same lien on real estate of the defendant in the county as a judgment of the District Court of the same county." (Statutes of 1855, §§ 78, 79, p. 304.)

It will be noticed that a *certified transcript* of the *judgment* is required to be filed in order to become a lien upon the real estate; and a transcript is defined by the authorities to be a *copy* of an *original record*. (Burrell's Law Dictionary.) It appears, from the facts developed in this record, that the paper purporting to be a certified transcript of the judgment rendered by the Justice and placed on file in the office of the Clerk of the District Court, was a mere abstract of the judgment rendered by the Justice, instead of a *certified copy* thereof as was required by the statute in force at the time. The filing of a *mere abstract* of the judgment, instead of a certified copy thereof, was an entire failure to meet the requirements of the statute in this respect, and therefore amounted to nothing.

The abstract fails to show upon its face that the judgment debtor was either served with process, appeared in Court, or had any notice whatever of the commencement of the action. In fact, it does not even show that a complaint had been filed. Then, so far as this abstract shows, the Justice had no jurisdiction whatever to render such a judgment, and it was therefore void upon its face. But it was insisted in the argument of this appeal by counsel for respondent, that this abstract was a substantial copy of the

Points decided.

judgment rendered by the Justice, as appears from a copy of his docket read in evidence at the hearing of this case in the Court below; but in this we think they were mistaken. The variance was not only substantial but material, as will plainly appear by an inspection of the two papers. The certified copy of the Justice's docket not only shows that a complaint was filed and that a summons was issued returnable on the 17th day of June, 1861, the very day on which the judgment was rendered; but it also shows that upon that very day the defendant appeared before the Justice and confessed judgment on plaintiff's demand, which judgment was then and there entered upon the docket of the Justice.

If such a transcript as this, properly certified, had been filed instead of a mere abstract of the judgment, it would have met the requirement of the statute and consequently secured the lien; because such a transcript would have shown upon its face not only that such a judgment was rendered and the amount of it, but the authority and jurisdiction of the Court.

No certified transcript of respondent's judgment having been filed in the office of the Clerk of the District Court, he acquired no judgment lien upon the premises embraced in appellant's mortgage: therefore we hold that the decree of the Court below is erroneous and should be reversed and modified, so as to give appellant the prior lien upon the land in question.

JAMES FULTON, ADMINISTRATOR OF THE ESTATE OF
WILLIAM LOGAN, DECEASED, APPELLANT, v. R. P.
EARHART, ADMINISTRATOR OF THE ESTATE OF J. W. P.
HUNTINGTON, DECEASED, RESPONDENT.

REVIEW OF FINDING OF FACT.—A finding of fact is not open to review, simply on a question as to the preponderance of evidence.

SETTING ASIDE FINDING.—When there may be ground for setting aside a finding or verdict, an appellate Court will proceed with caution if no motion was made in the Court below for a new trial.

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Statement of Facts.

ATTORNEY'S CERTIFICATE.—The attorney's certificate should not only show that the judgment is erroneous, but in what particular.

WHEN FINDING IS AN ERROR OF LAW.—If the allegations of a complaint are fully proved and there is no conflict of evidence, it is an error of law to find the contrary.

INTENDMENTS ARE IN FAVOR OF THE JUDGMENT.—Every intendment is in favor of the regularity and correctness of a judgment of a Court having jurisdiction.

IDEM—EVIDENCE PRESUMED.—The law will presume there was evidence to support a finding unless the contrary affirmatively appears.

APPEAL from Marion County.

This was an action for the recovery, as alleged in the complaint, of the agreed price of a number of horses, mares and colts, and of an undivided interest in a band of mares and colts sold by appellant to Huntington. While the action was pending in the lower Court, Huntington died, and Earhart, the administrator of his estate, was made defendant therein.

The answer denies that any sale was made except of an undivided one-third interest in a band of mares and colts to Huntington and one Morgan Reeves. It alleges that the purchase price at such sale was \$333.33, and no more; that it was agreed that Huntington should pay \$166.16, and no more, and that he made such payment; and it denies that he ever promised to pay any other sum.

A replication was filed denying the allegations of the answer, including that of payment.

The cause was tried without a jury, and the Court found that the evidence did not support the allegations of the complaint; that if any contract was made, it was between appellant, as administrator of the estate of Logan, and Huntington and Reeves. The cause was ordered dismissed. A statement containing the evidence of certain witnesses accompanied the appeal.

The assignment of errors was as follows: Error (1) in not finding that the preponderance of evidence was in favor of the plaintiff; (2) in finding that the evidence did not support the complaint; (3) in finding that if any contract was made, it was with Huntington and Reeves—the preponder-

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ance of evidence being to the contrary; (4) in finding that the proof did not agree with the allegations of the complaint; (5) in ordering the cause to be dismissed at plaintiff's costs; (6) in not finding a verdict and entering a judgment for plaintiff.

Bonham & Lawson, for Appellant.

Williams & Willis, for Respondent.

By the Court, UPTON, J.:

The cause was first before the Court on a motion to dismiss the appeal, on the ground that there is no error assigned which is reviewable by this Court. On that motion the following opinion was expressed:

The first and third assignments simply assert that the Court erred in determining the *preponderance* of evidence. This is not an error of law. If there is no evidence *tending* to support a finding, and it so appears by the record, that may be a matter to be reviewed, but a finding of fact is not open to review simply on a question as to the preponderance of evidence. (Civ. Code, § 533; *Borst v. Spelman*, 4 Comst. 284; *Western v. Genesee M. Ins. Co.*, 2 Kern. 258; *Dain v. Wyckoff*, 18 N. Y. 46.)

The statute in regard to what shall be reviewed in actions at law is no innovation upon the practice at common law. The rule is similar to that; the common law applies on writs of error and on reviewing the verdict of a jury. If there is no evidence to support the verdict it will be set aside; but if the questions turn wholly upon the preponderance of testimony and there is no other error complained of, the verdict will not be disturbed. Even when there may be ground for setting aside a finding or verdict, an appellate Court will proceed with caution where no motion was made in the Court below for a new trial.

The fifth and sixth assignments point to no particular ruling or action of the Court. It is not sufficient to declare that a judgment is erroneous, but the statute (Civ. Code,

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§ 527) requires that the certificates of the attorney should show that it is erroneous, "*and in what particular.*"

The second and fourth specifications are sufficiently definite, and the cause cannot be dismissed for want of assignment of errors. We are not now inquiring whether the errors exist, but whether they have been assigned. If the allegations of the complaint are fully proved and there is no conflict of evidence, it is an error of law to find the contrary, and the second assignment is sufficient to raise the question.

The same is true of the fourth assignment. If the proof did agree with the allegations of the complaint and the Court held the contrary, it was error, and is well assigned.

For the above reasons the motion to dismiss the appeal was overruled, and the cause is now submitted on its merits.

The appellant claims that by the admissions of the pleadings the plaintiff is entitled to a judgment for \$166.16, unless the defendant has proved that he paid that amount; and he claims that there was no evidence tending to show such payment.

There is a fault in this position. It disregards the rule that every intendment is in favor of the regularity and correctness of a judgment of a Court having jurisdiction.

The record brings before us some of the evidence adduced on the trial, but there is nothing in the record to show whether or not all the evidence is before us. The law will presume there was evidence to support a finding unless the contrary affirmatively appears. (*White v. Abernethy*, 3 Cal. 426; *Nelson v. Lemmon*, 10 Cal. 49.)

THE STATE OF OREGON, RESPONDENT, v. GEORGE DODSON, APPELLANT.

FORM OF INDICTMENT.—The form of indictment referred to, §71 of the Criminal Code, is sufficient.

WHAT BILL OF EXCEPTIONS SHOULD SHOW.—A bill of exceptions should show that the same point presented in the appellate Court was raised in the Court below.

EVIDENCE OF THREATS.—In a trial for murder where the defense is justifica-

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ble homicide, it is competent to prove the language and conduct of deceased towards defendant some days prior to the killing; the testimony showing that defendant was in fear of deceased at such time, and tending to show that he was in imminent peril of an attack from deceased at the time of the killing.

APPEAL from Union County.

The indictment charged the defendant "with the crime of murder, committed as follows: The said George Dodson, in the county aforesaid, on the 24th day of February, 1870, purposely and maliciously killed William Cochran by shooting him, the said William Cochran, with a pistol."

The defendant demurred on the ground that the facts stated do not constitute a crime; particularly specifying that the words "purposely and maliciously" state a conclusion and not facts; that the word "shooting" is not qualified by the words "purposely and maliciously," and that the words used in describing the offense are not equivalent to the words in the statute which define the offense. The demurrer was overruled, and the defendant, having excepted to the ruling, entered a plea of not guilty. Other grounds of error relied upon by the defendant are stated in the opinion of the Court. The defendant was convicted of murder in the second degree. A motion for a new trial having been overruled and judgment pronounced, he appeals to this Court.

Bonham & Lawson, for Appellant.

W. B. Laswell, District Attorney, and *J. W. Baldwin*, for Respondent.

By the Court, UPTON, J.:

The first point presented in this case is the sufficiency of the indictment. It literally conforms to the precedent published with the Code. Sec. 71 of the Criminal Code declares, in regard to "stating the acts constituting the crime," that the manner "as set forth in the appendix to this Code is sufficient." It is urged that the appendix is no part of the statute, and had no existence prior to the passage of the

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statute; that this provision of § 71 should be disregarded; that the shooting, or firing the pistol, being one of the facts necessary to constitute the offense, and the principal act, should be charged in a direct manner; and that the shooting should be charged to have been done purposely and maliciously.

Many reasons against so indefinite a mode of pleading are pressed upon our attention. We do not think the practice can now be questioned on the ground of public policy, but think the doctrine *stare decisis* should prevail. Whatever consideration these objections might have deserved if they had been presented before the Act received judicial construction, the subject is not in the same position now. Inasmuch as the body of the Act and the appendix seem to have been considered by the Legislature as component parts of the same statute and were published together as such; and as the appendix has been for several years invariably treated by the Courts as a part of the statute; and the use of this form not being deemed subject to constitutional objection; either the departure from the prescribed mode, if there be any in the enactment, should be deemed an informality only, and not a substantial deviation from the requirements of the Constitution, or such forms as have grown into general use should be held to be sufficiently established by the practice of the Courts until the Legislature direct a change.

The indictment charged shooting with "a pistol;" the defendant objected to proof of shooting with a *revolver*. The objection was properly overruled. (Roscoe Cr. Ev., 649.)

It is shown by the bill of exceptions that the defendant had proved that about ten days before the homicide, the deceased had threatened to kill the defendant, and that the threats had been communicated to the defendant; that the deceased was a man of great physical strength, who "usually went armed," and "was a *desperado*," and was "at the time of the shooting alleged in the indictment advancing on the defendant with the threat that he would beat the defendant to death;" and that on the said occasion,

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ten days previous to the homicide, the defendant was obliged to leave his place of business to evade an attack made by the deceased. The defendant offered to prove by one Minor that on the occasion last mentioned, "the said deceased broke open the door of the said business-house of the said defendant and entered the same, saying, 'I will get the damned rascal yet;' and when he had so entered said place of business, the deceased then and there destroyed the property of said defendant therein." This evidence was rejected and the defendant excepted. The defendant also offered to prove by James Wilson that one week before the homicide the deceased threatened to kill the defendant, the threats not being communicated to the defendant before the homicide. The evidence was rejected and the defendant excepted.

It is not disclosed by the bill of exceptions whether the testimony of Wilson was offered as circumstantial evidence tending to prove the actual existence of imminent danger, or whether it was offered solely for the purpose of showing that the appearances were such as to lead a reasonable man to believe that he was in imminent peril and that there was no other mode of saving his own life. In the latter case, threats previously made and not communicated are not pertinent. "Such threats without an overt act, when sought to be introduced by a defendant in justification of a homicide, must be shown to have been communicated to him." (*Keener v. State*, 18 Geo. 149.)

We are not called upon to say that no case can arise where previous threats not communicated would be received. The question before us is, whether refusing to receive the evidence in this case was error, and if that depends upon the purpose for which it was offered the exception should disclose the purpose or at least show that the same point that is presented here was raised in the Circuit Court. (*Dunning v. Rankin*, 19 Cal. 643.) "Errors cannot be relied on in the appellate Court, which are not taken advantage of and raised at the trial." (*Morgan v. Hugg*, 5 Cal. 409.)

Every intendment is in favor of a judgment of a Court of

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record that has once acquired jurisdiction, and until the contrary be made clearly to appear, the appellate Court is bound to presume that the ruling is correct and founded upon sufficient reasons. It is possible that one of the grounds upon which the appellant now relies might have been obviated at the trial had it been stated. It is probable that the Court rejected the testimony of Wilson because the defendant claimed the right to use it to add weight to the evidence already given tending to excuse the act on the ground of *appearances* of imminent peril. If this was the avowed purpose, the Court was right in rejecting it, for to admit it solely for such an avowed purpose would tend to mislead the jury. (*Jackson v. Caldwell*, 1 Cow. 622; *Waters v. Gilbert*, 2 Cush. 27.)

We say this is the probable purpose, because it is argued by counsel in this Court that the defendant was entitled to it for the purpose last mentioned. We cannot therefore say from what is before us that the Court erred in rejecting the testimony of the witness Wilson. A part of the proposed testimony of the witness Minor was material, and there was a portion of it that the defendant was not entitled to introduce. If it was offered and claimed as a whole the objection to the evidence would be well taken. Had no motion for a new trial been made, and had the case been argued in this Court on the assumption that the defendant claimed to be equally entitled to each part of Minor's proposed testimony, I think this Court would be in duty bound to sustain the ruling of the Circuit Court. But it appears from the argument on behalf of the State, that it was held in the Circuit Court that neither proposition offered was admissible and in favor of a defendant in a criminal case, we may be justified in treating the two propositions as severally offered.

The latter statement to the effect that after the deceased had entered the premises of the defendant, the defendant having gone away, the deceased "destroyed the property of the defendant," was not a circumstance directly tending to show that he was seeking to make a personal attack on the defendant. Had the cross-examination sought to call out

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such facts to *disprove* such intent, I can see no objection; but to allow a defendant to draw them out against the objection of the State would tend to indicate to the jury that a previous injury to the defendant's property in some way palliated or justified the killing. Although so monstrous a doctrine would seem to carry its own refutation on its face, yet if a judge should deliberately permit a defendant to introduce such evidence after objection it would tend to create confusion in the minds of jurors, and there is some danger that unprofessional and inexperienced men might through such means imbibe errors extremely prejudicial to the cause, to themselves and to the public.

But in relation to the threats which the witness Minor was called to prove, I think there can be no doubt of their admissibility. It was already in proof that the defendant was put in fear of the deceased on that occasion, and had left his place of business to evade an attack by the deceased, and he must have been cognizant of the transaction. The evidence offered tended to show the acts and the manner of the deceased when he was in pursuit of the defendant, and to show what and how great cause there was for the fear which the defendant entertained. It was in this respect evidence of the same class as evidence of threats previously communicated to the defendant. It would therefore be material under the theory of defense that the defendant acted upon well-grounded apprehension that he was in such imminent danger that there was no other means of escape. And under the theory of defense, that the peril and necessity was real and actual, and that in fact the defendant was without fault, and was in such imminent danger from an attack then being made, that there was no way for him to escape great bodily harm but by slaying his assailant, this was competent as circumstantial evidence tending to show the motives and purposes of the deceased in making the present attack. If it was competent to show the threat implied in the words, "I will get the rascal yet," it was competent to show the circumstances under which the words were used. And as it appears from the record that this transaction had come to the knowledge of the defendant and

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had put him in fear, and as part of the transaction was already before the jury, it was important, in order to a full understanding of the defense offered, that these circumstances should be admitted in evidence. (Whart. on Hom. 417; *Shorter v. People*, 2 Comst. 197.)

For the error in excluding this evidence, the judgment should be reversed and a new trial granted.

S. M. SMITH, T. A. DAVIS AND P. C. SCHUYLER,
RESPONDENTS, v. THE ELLENDALE MILL COM-
PANY, APPELLANT.

JUDGMENT FOR WANT OF ANSWER.—Under the Code a judgment for want of an answer cannot be appealed from.

WHEN JUDGMENT FOR WANT OF AN ANSWER CAN BE TAKEN.—A judgment for want of an answer can only be taken when it appears that defendant has been *duly served with summons* and has failed to answer the complaint within the time allowed by law.

WHAT CONSTITUTES DUE SERVICE.—To be duly served with a summons implies that the defendant has been duly served with a summons, *notifying him to appear and answer in the Court where the judgment is sought to be taken*.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Williams & Willis, for Appellant.

Mitchell & Dolph, for Respondents.

By the Court, PRIM, C. J.:

This was an action at law to recover money on account for drugs, dyes, etc., sold by respondents to appellant, on request. Judgment was rendered against defendant in the Circuit Court of Marion County for the amount claimed in the complaint, there being no answer filed thereto by appellant.

The summons served on appellant is entitled, "In the Circuit Court of the State of Oregon, for the County of Multnomah," and required appellant to appear and answer

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in the Court above mentioned, instead of that for the county of Marion, where the judgment was rendered. This summons was served on R. P. Boise, the President of the Ellendale Mill Company, in the county of Marion, by the Sheriff of said county. Appellant appeals from this judgment, and alleges as error that the Court had no jurisdiction of the defendant, for the reason that there was no summons served on it to appear in said Court, the summons being to appear in the Circuit Court of Multnomah County.

The respondents admit the judgment to be erroneous in this respect, but claim this Court has no jurisdiction to entertain this appeal, for the reason that the judgment was rendered in the Court below for want of answer, from which, it is claimed under the Code, no *appeal lies*. The Code provides that "any party to a judgment or decree other than a judgment or decree given by confession or for want of answer may appeal therefrom." (Civ. Code, § 526.) It further provides (Civ. Code, § 246), that a judgment for want of answer can only be rendered when "*it appears that the defendant has been duly served with the summons, and has failed to answer the complaint*" within the time allowed by law.

Under the Code any judgment other than one given by confession or for want of answer may be appealed from. It is not claimed that this judgment was given by confession. The only question then to be determined here is, whether it is such judgment as could be taken under the Code for want of answer. If so, no appeal lies and the motion of respondents to dismiss should prevail. The language of the Code is when "*it appears that the defendant has been duly served with the summons,*" etc. This language, we hold, implies not only that it should appear that defendant has been duly served with a summons, but that the summons served should notify him to appear and answer in the Court where judgment is sought to be rendered against him. To hold otherwise would not only defeat the object of the statute, but open a wide door to fraud. The object of requiring a summons to be served on the defendant is not only to notify him that he is sued, but to

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inform him of the nature of the action and in what Court he is required to appear and answer. And when it appears that such a summons has been duly served on him and he fails to answer within the time allowed by law, a judgment for want thereof may be rendered against him; and from such judgment the Code provides no appeal can be taken.

The motion of respondents to dismiss this appeal is overruled and the judgment of the Court below reversed.

ARTHUR WARNER, RESPONDENT, v. JOHN MYERS,
APPELLANT.

MANDAMUS.—The writ of mandamus is the proper remedy to compel the incumbent of an office to deliver to his successor the appurtenances, etc., thereof.

IDEM.—The proceeding under the writ cannot be used as a means of determining the ultimate rights of the parties to the office.

WHAT MAY BE INQUIRED INTO UNDER THE WRIT.—The principal fact to be ascertained is, to whom did the Board of Canvassers award the certificate of election? It being the duty of the Board to determine this question in the first instance, the correctness of its decision cannot be inquired into in this form of proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed or set aside by a competent tribunal and in a proceeding where its correctness may be inquired into.

APPEAL from Clackamas County.

Respondent filed a petition in the Circuit Court of Clackamas County, praying for a writ of mandamus to compel appellant to deliver to him the jail of the county, with its appurtenances and property therein belonging to the county.

The petition alleges that Warner was duly elected Sheriff of said county on the 6th day of June, 1870; and that since said election he has duly qualified and entered upon the duties of said office. That Myers was the acting Sheriff of said county prior to the election and qualification of said petitioner. Myers, in his return to the writ, alleges that he had received a majority of all the legal votes cast in Clackamas County for said office of Sheriff; and that a proceeding was then pending in Court wherein he is contesting

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the right of respondent to hold said office. This portion of the return was stricken out on motion as irrelevant matter, to which ruling of the Court appellant excepted.

At the trial respondent produced in evidence the certificate of election issued to him upon the canvass of the votes and his oath of office indorsed thereon; his official undertaking with affidavits of justification of sureties, together with its indorsement of approval and filing. He then produced a certificate from the County Clerk, showing that he had qualified as Sheriff on the 5th day of July, 1870. Appellant then proved that he had been in possession of the county jail continuously during the past year.

On final hearing the writ was made peremptory by the Court as prayed for in the petition.

Myers appealed.

Kelly & Reed, for Appellant.

Johnson & McCown, for Respondent.

By the Court, PRIM, C. J.:

This was a proceeding in the Circuit of Clackamas to compel appellant by a writ of mandamus to deliver to respondent the county jail with its appurtenances and property therein belonging to the county. Under the provisions of our Code the office of this writ is precisely the same as it was at common law. It may be issued to any inferior court, corporation, board, officer or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station. (Civ. Code, § 583.)

Two questions are raised by appellant on this appeal:

First. He claims this writ was improperly issued, for the reason that respondent had a plain, speedy and adequate remedy in the ordinary course of law.

Second. That the Court erred in striking from his return to the writ that portion which alleges that he had received a majority of all the legal votes cast for the office of Sheriff in the county of Clackamas; and that a proceeding was

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then pending in the Court wherein he was contesting the right of respondent to hold said office of Sheriff.

We will first consider the question whether respondent had a plain, speedy and adequate remedy in the ordinary course of law. If he had, the same section of the Code just referred to provides that this writ shall not issue.

The only remedy pointed out by counsel for appellant is that provision of our statute which provides how the election of any person to any county or district office may be contested. (Mis. Laws, ch. 14, §§ 41, 42.) Sec. 41 provides that "any person wishing to contest the election of any person to any county or district office may give notice in writing to the person whose election he intends to contest, that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected." The next section provides that "such notice shall be served as a summons ten days before the hearing of said contest, and that if the Circuit Court cannot hear it in term time within one month of the termination of such election, the Circuit Judge may hear and determine it at chambers as soon thereafter as may be practicable, and shall make all necessary orders for the trial of the case." It further provides that "the County Clerk shall issue a certificate to the person declared to be duly elected by said Court." Here this proceeding ends. All the Court can do in a proceeding of this nature, is to determine who was duly elected, and order a certificate to be issued by the Clerk to the person so declared duly elected. Respondent had no occasion to resort to this remedy, as he was already in the possession of a certificate of election duly issued by the County Clerk in pursuance of the decision of the Board of Canvassers, whose duty it was under the law to canvass the votes and determine who had received a majority of all the legal votes cast. If he had resorted to this proceeding, all the Court or Judge could have awarded to him at the end of the proceeding would have been a certificate of election. With such a certificate in his possession he could not have entered upon the duties of the office until he had qualified by taking the oath of office and

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filing his official undertaking. This is precisely what he could have done, and in fact had done under the certificate which he already had at the commencement of this proceeding. But appellant having been the former incumbent of the office, refused to recognize respondent as Sheriff, and refused to deliver to him the county jail with its appurtenances and property therein belonging to the county, to the possession of which the Sheriff is entitled by virtue of his office. Thus it will be seen that the remedy pointed by respondent is entirely inadequate to meet the emergency of this case. What appellant desires is, to be placed in the actual possession of the county jail and its appurtenances; and we know of no other plain and speedy remedy, in the ordinary course of the law, by which this object can be obtained.

The statute concerning elections (Mis. Laws, ch. 14, § 35) "makes it the duty of the county clerk, when the votes are canvassed, to make out a certificate of election, to each of the persons having the highest number of votes," etc. By § 9, General Laws (p. 692), "the sheriff must qualify by filing with the county clerk of the county wherein he is elected, his certificate of election, with an oath of office indorsed thereon, * * * and also give and file the undertaking hereinafter provided." By § 983 (Civ. Code): "When a new sheriff is elected or appointed, and has qualified, the county clerk shall give him a certificate of that fact, under the seal of his office." "Whenever thereafter the new sheriff is authorized by statute to enter upon the duties of the office, he shall serve such certificate upon the former sheriff, from which time his powers cease, except when otherwise specially provided." By § 984: "Within one day after the service of the certificate upon the former sheriff, he shall deliver to his successor the jail of the county with its appurtenances and the property of the county therein."

Under the provisions of the Code just cited above, and under the facts appearing in this record, it was the duty of appellant to deliver to respondent the county jail with

Points decided.

its appurtenances and property therein belonging to the county.

The next question to be determined is whether that portion of appellant's return to the writ should have been stricken out by the Court, which alleges that he had received a majority of all the votes cast and that a proceeding was then pending in Court in which appellant was contesting respondent's right to hold said office. We think it is well settled by authority, and conceded to be law by both parties, that this proceeding cannot be used as a means of determining the ultimate rights to the office.

The principal question of fact to be ascertained in this proceeding is, what was the decision of the Board of Canvassers? To whom did that Board award the certificate of election? It was the duty of that Board to decide that question in the first instance, and the correctness of its decision cannot be enquired into in this proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be enquired into. (*Lawrence v. Houghton*, 5 Johnson, 128; 6 Hill, 114; 4 Renmen, 329; 2 Seldon, 137.) The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed. (49 Barb. 166.)

The Court acted correctly in striking out that portion of the return in question, for the reason that it presented matter irrelevant and not pleadable in this proceeding.

Judgment affirmed.

Mr. Justice McARTHUR did not sit in the cause.

THE TRUSTEES OF THE M. E. PROTESTANT
CHURCH, AT JEFFERSON, RESPONDENTS, v. S.
B. ADAMS, APPELLANT.

UNINCORPORATED SOCIETIES MAY BECOME BENEFICIARIES OF A SPECIFIC TRUST.—

Unincorporated societies, created for religious or benevolent purposes, when organized so as to entitle them to become incorporated under the laws of the State, are capable of becoming the beneficiaries of a specific

Argument for Respondents.

trust created for their benefit, and our Courts will, in the exercise of a chancery jurisdiction, enforce such trusts.

TRUSTEES OF SUCH SOCIETIES MAY SUE.—The trustees and agents of such societies have legal capacity to sue, when the suit is brought for the benefit of the association.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Mallory & Shaw, for Appellant.

There was no society in existence at the time the grant is alleged to have been made. There was therefore no one to take the grant and it is void. (*Trustees of Baptist Association v. Hart's Executors*, 4 Wheat. R. 1.) If the grant was not good at law, it cannot be sustained in equity; nor will it be favored as a charity. The law applicable to grants to charity is the same in this country as that applicable to other grants. (*Id.* 333–344; *Owens v. Missionary Society*, 14 N. Y. 406, 407, 408; *Bascom v. Albertson*, 34 N. Y. 585–621; *Fontain v. Ravenel*, 21 Curtis, 563.) A grant or devise to a voluntary unincorporated association cannot be sustained. (14 N. Y. 407; *Jackson v. Carey*, 8 John. Ch. R. 385; *Hombek v. Westbrook*, 9 John. Ch. R. 73; 21 Curtis, 563.) A voluntary association cannot confer upon itself corporate power and give to itself the quality of perpetual succession. (*Austin v. Leasing*, 16 N. Y. 118–123; 4 Curtis, 339.) The statute of charitable uses is not in force in this country; nor is the prerogative or *cy-pres* power, conferred upon the Chancellor of England, possessed by Chancellors in America. (4 Wheat. R. 1; 4 Curtis, 336–340, 343; *Bascom v. Albertson*, 34 N. Y. 612–616; 17 How. (S. C.) 387; 21 Curtis, 558, 565, 566; *Mis. Laws*, ch. 3.)

Williams & Willis, for Respondents.

A conveyance of land to certain persons and their successors in office as trustees for an unincorporated religious society is good, and a bill in equity may be maintained for the benefit of such society, in the names of those persons, members of such society, selected by such society as the

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successors in office of those trustees named in the deed, to correct a mistake in the deed in the description of the land, or to compel the specific performance of a contract to convey. (2 Pet. R. 578; 8 Curtis, 212; 1 Hoffm. Ch. R. 142; 3 Pet. R. 114; 1 Hoffm. Ch. R. 202, 238, 264; 7 Vermont, 241.) A bequest of property to trustees, to be paid by them to an unincorporated society, to be by such society expended, is good. (45 Maine, 122.) A devise will be held good made to the minister and wardens, and their successors in office, of a church, without naming them, and an action may be maintained, in the name of the successors, for injury to the property. (9 Mass. 501.)

The case of grants and dedications to public and religious uses, forms an exception to the general rule applicable to private grants, which requires a grantee capable of taking the estate; whereas, in the former, the grant may take effect, although there be no grantee *in esse*. (45 N. H. 98; 6 Pet. R. 431; 9 Cranch, 292.)

By the Court, THAYER, J.:

It is alleged in the complaint in this suit—

That the plaintiffs are the regularly elected and acting trustees and agents of the Methodist Protestant Church of the town of Jefferson, in Marion County, in the State of Oregon.

That on the 5th day of June, 1857, one James Bates, being then the owner and in possession of the following described premises, to wit: Commencing at the southwest corner of the Institute lot on the land claim of James Bates, in the town of Jefferson, in Marion County, Oregon; thence running south on the section line eighty-six feet; thence west eighty-six feet; thence north eighty-six feet; thence east eighty-six feet, to the place of beginning—gave the same to the Methodist Protestant Church. And the said Bates, and Margaret, his wife, for the purpose of securing said land to said church, the same not being then organized, executed and delivered to one E. E. Parrish, who was at that time a member of said church, a deed duly executed, supposed to be and intended as a deed of

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conveyance thereof; and said Parrish received said deed for the purpose of holding and securing said land to said church, the members thereof consenting to the same.

That subsequently, and on the 20th day of July, 1858, the said church being then duly organized, said Parrish, and Rebecca, his wife, intending to carry out the intention and understanding with said Bates and the members of said church, undertook, by their deed duly executed, to convey said land to Henry Martin, S. W. Knox, Lewis Jones, B. B. Cox and Jabez Terhune, the then trustees of said church, and to their successors in office, for the use and benefit of said church.

That at the time of the delivery of said deed to said Parrish, he and the other members of said church took the possession of said land, and erected thereon a house for the use of said church and the members thereof, as a place of worship, at great trouble and expense.

That at the completion of said house, the same was regularly dedicated, and that the trustees of said church, and the members thereof, have continuously ever since held, used, occupied and enjoyed said house and land as a place of public worship for the use of said church and the members thereof.

That said Bates at the time advised and assisted in the construction of said house, and has ever since, to within a very short time, consented to the maintenance of said building upon said premises for the use aforesaid.

That there is a mistake in the deed from said James Bates and wife to said E. E. Parrish, and in the deed from said Parrish and wife to the said Henry Martin and others, trustees as aforesaid, in that said land as described in said deeds is described as commencing at the northwest corner of the Institute lot, when the same should have been described as commencing at the southwest corner of said lot.

That said mistake was made by the parties who wrote said deeds, and was not discovered by the parties thereto until long after the execution thereof.

That on the 29th day of January, 1870, the defendant, S. B. Adams, for the purpose of cheating, wronging and

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defrauding plaintiffs, and the other members of said church, out of said lands and the said buildings, fraudulently concluded with said Bates and wife, and, without consideration, procured from said Bates and wife a deed of said premises.

That said defendant knew at the time of, and prior to his obtaining said deed from said Bates and wife, all the facts in relation to the ownership and possession of said premises charged in the complaint.

Plaintiffs prayed relief; that the defendant execute and deliver to them, as such trustees, a conveyance of said premises for the use and benefit of said church, and that the defendant be barred and estopped from ever after setting up any claim thereto.

The defendant interposed a demurrer to the complaint upon the following grounds:

1. That the complaint did not show that the plaintiffs have legal capacity to sue.

2. That the complaint showed a defect of parties plaintiff.

3. That the complaint showed a defect of parties defendant.

4. That the complaint did not state facts sufficient to constitute a cause of suit.

If it be conceded that the proper parties were before the Court, and that the plaintiffs had legal capacity to sue, there would be no difficulty in determining the case at once. There is no question but that the complaint is sufficient to constitute, as between proper and competent parties, a cause of suit. The demurrer admits the complaint to be true, and the correcting of a mistake by reforming a deed so as to make it include a description of premises which the parties intended it to cover, has always been an acknowledged branch of equitable jurisdiction.

The main question to be determined is: Had the plaintiffs legal capacity to sue under the circumstances of this case, and the right to claim the relief decreed by the Circuit Court herein?

This question leads to an examination of the rights and capacities of voluntary associations in the State of Oregon, such as organized churches, and religious, benevolent,

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literary and charitable societies, and the jurisdiction of Courts of equity respecting the same. I do not understand that it is claimed that a society of that character is clothed with the legal capacity of an individual to any extent. Such societies are very numerous, and wield an extensive and important influence in community. They are really the instrumentalities through which religion and learning are disseminated and charity exercised throughout the land, to a great extent, at least. The statutes of the State recognize their existence and provide for their incorporation.

Chapter 3, Miscellaneous Laws, prescribes the requirements necessary to their incorporation. They must have an organization before they can become incorporated; and subdivision 3 of § 4 of said chapter requires that the estimated value of property and money *possessed* by "said church," etc., shall be specified in the articles of incorporation. ♦

Again, the articles must be made by the officers or trustees of such association. This is a clear recognition of such organizations and of their right to possess property. Upon the incorporation of the association such property is transferred by act of law to the corporation. (*Happy v. Morton*, 33 Ill. 398; *Merrill v. McIntyre*, 13 Gray, 157.)

It has been repeatedly held, that an unincorporated society is capable of receiving a bequest, and that a Court of chancery will enforce the same. (*Coggeshall and others, Trustees of New Rochelle v. Patton and others*, 7 John. Ch. 291; *Hombeck v. American Bible Society*, 2 Sand. Ch. R. 133; *Wright and others v. Trustees of the M. E. Church*, 1 Hoff. Ch. 222; *Potter v. Chapin and others*, 6 Paige R. 639; *King v. Woodhull*, 3 Edward Ch. 79; *Executors of Burr v. Smith*, 7 Vt. 241; *Bartlett v. Nye*, 4 Metc. R. 378.)

In the case of *Owens v. Missionary Society of the M. E. Church* (14 N. Y. 380), some doubts were expressed as to the soundness of these authorities. Judge Selden, who announced the opinion of the Court in that case, asserted that a devise or bequest to an unincorporated association was, in general, void, as well in equity as at law; he admitted, how-

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ever, that such bequests were, in certain cases, sustained, but affirmed it was only by virtue of the jurisdiction exercised by the Courts of equity in regard to charitable uses. His conclusions upon that point were: That where a bequest was made to an unincorporated society, whose general objects were known to be "religious" or "charitable," a trust might be implied, that the general fund would be devoted to those objects. (14 N. Y. 387.) It will be seen, by a careful examination, that this case does not decide that an unincorporated society cannot receive a bequest, but that its right, in that respect, will depend entirely upon the question as to whether the general objects of the society are known to be "religious" or "charitable;" and if so, a trust may be implied, that the fund will be devoted to such objects and the bequest upheld as a charity.

In the case of *Potter v. Chapin*, before cited, the Chancellor lays down the proposition, that a gift, bequest, or dedication of property to public or charitable uses (provided the same is consistent with local laws and public policy), where the objects of the gift or dedication are specific and capable of being carried into effect according to the intentions of the donor, will be sustained and protected by the Court of Chancery. The same proposition was affirmed in the case of *Perin v. Casey et al.*, 24 How. U. S. 501.

In *Bartlett v. Nye* (4 Met.) before cited, it was held that a devise of real estate to an unincorporated society for charitable uses, was valid, and that equity would enforce the trust as against the heirs; but the peculiar jurisdiction of the Court of Chancery over the subject of charitable uses, as it existed at common law and under the statute of 43 Elizabeth, and exists in many of the older States, where, as in Massachusetts, the principles of the statute of 43 Elizabeth still prevail, does not particularly affect this case. Equity jurisdiction, as administered by the Courts of this State, derives its authority from the Constitution and laws of Oregon, and includes only the ordinary jurisdiction of the Court of Chancery of England, modified and extended by the statutes of this State, and the changes in the condi-

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tion of the affairs of our community. I refer to these authorities more particularly to show that voluntary associations are recognized in law as having a capacity for certain purposes, and it is conclusive to my mind that such associations in Oregon, when organized so as to entitle them to become incorporated under the laws of this State, are capable of being the beneficiaries of a specific trust created for their benefit, and that our Courts, in the exercise of chancery jurisdiction, will, in a proper case, enforce the same.

I do not hold that such societies can take and execute a trust. As societies they cannot be trustees so as to be vested with legal title. It was decided in the case of the *Baptist Association v. Hart's Executors* (4 Wheat. 1) that a voluntary association was incapable of taking and executing a trust, and, so far, that decision is approved. Nor can such an association take or hold title to real estate. An unincorporated society is not competent to take an estate in fee. (*Hornbeck v. Westbrook*, 9 John. Ch. R. 73.) It cannot, however, be denied but that such associations have property rights. They certainly have the right to use and enjoy the means necessary to maintain their organization and the consequent right to be protected in the possession thereof. They possess, at least, a *limited legal status*.

Take the case at bar. Can any one reasonably claim that this church had no right to use and enjoy a piece of land, eighty-six feet square, for the purposes of erecting thereon and maintaining a church building? Would such a use conflict with public policy, or be inconsistent with local law? Are not such rights accorded to every religious society in the land? It was a use of property essential to its organization. The members of the church must have a place to congregate, and they certainly ought not to be compelled to subject themselves to an action for trespass in so doing, nor should they have to depend upon the generosity of mankind for such privileges, and yet if it be true that voluntary church associations cannot be the beneficiaries of real property, for any purpose, and their rights to the use thereof be enforced in a court of justice, what assurance would the members and attendants have that they could

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meet and worship, according to the dictates of their faith and conscience, with any degree of freedom or security? This would present a state of affairs not altogether unlike that which existed in the first centuries, when it was regarded as an offense for Christians to assemble in the name of the Saviour.

It appears from the complaint in this case that the proprietor of the land in controversy, James Bates, set it apart for the use and benefit of the Methodist Protestant Church of the town of Jefferson in Marion County, as a site for the erection of a house for public worship, intending to give the same to the church for that purpose. That in order to carry out such intention, said Bates and wife executed a deed to one E. E. Parrish, intending to convey the said land to Parrish for the use and benefit of said church for the purpose aforesaid, and that Parrish received said deed for the purpose of holding and securing said land to said church for such purpose, the members thereof consenting thereto. That after the church became organized and had elected trustees according to the discipline of said church, Parrish and his wife executed a deed to Henry Martin and four others, then such trustees, and to their successors in office, intending thereby to carry out the intention and understanding with said Bates and the members of said church. That Bates at the time was a member of said church, and after the execution of the deed by him to Parrish he and the other members thereof took possession of said land and erected and built thereon a house for the use of said church and themselves as a place of worship, under the impression, no doubt, that the perpetual use of the land was secured for the uses and purposes mentioned. That after the completion of said house the same was regularly dedicated, and they have continuously ever since held, used and enjoyed the same, and said land, as a place of public worship according to the usages of the Methodist Protestant Church. If there had been no misdescription in the deed from Bates to Parrish the land would have been conveyed and the members of the church been secured in its enjoyment.

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The principle recognized in the case of *Vidal v. Girard's Executors* (2 How. U. S. 127), would no doubt apply. This, in fact, would be a much stronger case than that. A difficult question arose there. First, as to the capability of the corporation of the City of Philadelphia to take under a devise of real and personal estate in trust for the purpose intended. And second, the beneficiaries of the trust were uncertain. Here there is no doubt as to Parrish being competent to receive the title to the land in the character of trustee, and no uncertainty in identifying the beneficiaries.

The gift was for a specific purpose, and I hardly think any one will question the right of Bates to appropriate his land to the purpose intended; but owing to this mistake the legal title never passed to Parrish, and was not conveyed to Martin and the other trustees for the like reason, and probably would not have been conveyed to them under any circumstances. The grantees in the deed from Parrish, to wit, "Trustees and successors," etc., doubtless rendered it entirely too uncertain to pass the title; but this question need not be determined in this case.

The defendant Adams, as shown by the complaint, has attempted to take advantage of the condition of affairs occasioned by the mistake in the deed to Parrish, and through collusion with Bates, has procured from him a deed to the land and appurtenances, intending to wrong this association and its members out of the same; and the question to be determined is, has the society or its members, under the circumstances of the case, any remedy.

It was claimed by the appellants' counsel upon the hearing, that the society in question, not then being organized, had no existence at the time the grant of the land was attempted to be made, and that consequently the grant was void. I cannot indorse this view. Bates made the deed to Parrish in trust for the benefit of this society. Parrish was a competent grantee, and the fact that the society was not then in a condition to receive the benefit of the trust as an organized association, did not prevent it from claiming such benefit after it became organized. While the law

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requires a present competent grantee to receive title, yet a beneficiary or *cestui que use*, though not in existence at the time of the grant, may be competent to claim the benefit when ushered into being.

It is a principle of the common law that the fee to real property cannot be granted to commence *in futuro*. The title cannot remain in abeyance, but must immediately vest or not pass at all; but its use may be limited to such objects and purposes as the owner may deem proper, if legitimate; the grantor having the absolute *jus disponendi* of the property may annex such conditions to its enjoyment as he may desire, if consistent with public law. The use may be to some object thereafter to be established. (*Inglis v. Sailors' Snug Harbor*, 3 Pet. 99.) If there is a competent grantee and a beneficiary capable of being identified the conditions of the law are answered. (*Dutch Church in Garden Street v. Mott*, 7 Paige Ch. R. 77.)

The respondent's counsel claims that grants and dedications to public and religious uses form an exception to the general rule applicable to private grants, and may take effect although there be no grantee *in esse*. I concede that lands may be dedicated by the owner to public or pious uses, and that when the public have entered upon the use of the land so dedicated, so that to allow it to be reclaimed would be unjust, the dedication becomes irrevocable. (*Beatty v. Kurtz*, 2 Pet. R. 566; *City of Cincinnati v. White's Lessees*, 6 Pet. R. 431.)

If such dedication can be regarded in the nature of a grant, it constitutes the only exception that I am aware of where a grantee *in esse* can be dispensed with. I am rather inclined to agree with the appellants' counsel that the law applicable to grants to charitable uses is the same in this country as that applicable to other grants, unless a dedication may be included under the head of grants. But I am satisfied that the transaction between Bates and Parrish in regard to making the deed of June 5, 1857, and the fact that the members of the society in question, relying upon the same, took possession of the land in controversy, built the house thereon as a place of worship, and used the same

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with the consent and approval of all parties, creates in equity a good and valid trust in favor of the society, which Bates had no right to violate; and that the deed from Bates to Parrish constituted, in equity, at least, an agreement to convey the land; and the subsequent entry by the members of the society into the possession and expenditure of money, as shown by the complaint, upon the faith of such transaction, renders such agreement valid and binding upon Bates and his grantees, who might take the title with notice thereof.

The rule ordinarily is, that a mere stranger to an executory contract between third persons cannot avail himself of the benefits of its provisions, although named therein as a beneficiary; but where the contract is of such a nature and has been so far acted upon as to change the condition in life of the stranger, and to raise reasonable expectations in him, grounded upon the contract, it constitutes an exception to the general rule. This case clearly comes within the principle of the exception. It is not at all probable that the members of this society would have entered upon the land in question, and built and erected, at great cost and trouble, the church edifice referred to, if Bates had not proposed to give them the land in question and executed the deed to Parrish with that intent; that transaction must have raised expectations of that character in their minds, and induced them to do as they did in that respect; and now to permit Bates, notwithstanding this, to dispose of the land in disregard of the rights of the association, would be in violation of common honesty and fair-dealing. The defendant Adams having taken the title with full notice of the facts, must therefore be regarded as a trustee of the legal title for the benefit of the society; that is, he took it impressed with the trust.

It is now settled law that the Court of Chancery, before as well as at and after the statute of Elizabeth, would, where the uses were charitable and the grantor competent to convey, aid a defective conveyance to uses. (2 Kent's Com. 287, and note "A.") And it appears to me that the Courts of this State, in the exercise of chancery jurisdic-

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tion, should certainly not hesitate to aid a defective conveyance where the grantor was competent to convey and the grantee competent to receive, and a beneficiary not only entitled to take the benefit of the use, but has materially contributed to the consideration of the grant.

My deductions from the foregoing premises are: That the association in question, known as the Methodist Protestant Church, of the town of Jefferson, is entitled to claim as a remedy under the condition of affairs shown by the complaint, and consistent with the law applicable to the facts, that the defendant, S. B. Adams, be declared a trustee of the legal title to the land in question, for the use and benefit of the association or church, for the purposes mentioned in the complaint, and that said defendant be perpetually enjoined and restrained from interfering with such use and enjoyment by the association and its members. If this conclusion is correct, the main question raised by the demurrer to the complaint, and the only difficult one in the case, the question whether the plaintiffs have legal capacity to sue, is easily solved. The association could not maintain a suit in its associate name. The several members might unite as plaintiffs and legally claim a remedy, but it certainly would be very inconvenient to do so, and, to avoid such difficulty, the Legislature wisely provided that, where the parties are very numerous, and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole. (Civ. Code, § 381.) This provision is but declaratory of a rule of equity, which had existed long before the adoption of the Code, and which the members of this association were entitled to the benefit of in bringing this suit. The plaintiffs allege that they are the trustees and agents of the association, and claim relief for the benefit of the association and members thereof. I can only regard the suit as brought for the benefit of all the members of the Methodist Protestant Church of the town of Jefferson, and in that view they certainly have legal capacity to sue and enforce the remedy to which the association is entitled. Under this view of the case there is no defect of plaintiffs. It is to be presumed that

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this church embraced as many members as churches in general, that are similarly situated, and to bring them all before the Court would be almost impossible. Such a practice should not be tolerated. They are members of the association, and entitled to maintain the suit for the benefit of all the members thereof. (*Beatty v. Kurtz*, 2 Peters, *supra.*)

Neither is there a defect of parties defendant. Adams has the legal title, and a full and complete remedy may be had without bringing any of the other parties who have participated in the transaction referred to before the Court. They are not necessary parties to a complete determination of the question involved in the suit.

The Circuit Court, in pursuance of the prayer of the plaintiffs, decreed that the defendant execute a deed conveying the land to said plaintiffs, as trustees of said association, for the use and benefit of the association, or that in default thereof the decree operate as such conveyance, etc. I doubt whether relief to that extent could be legally claimed or granted in this case. I do not think that the plaintiffs had a right to claim any remedy beyond that before stated. But, as that part of the decree is more formal than otherwise and does not affect any substantial right, it may as well be allowed to stand uncorrected in that particular.

The judgment of the Circuit Court should therefore be affirmed.

A. H. BROWN, RESPONDENT, v. WM. HARPER, WM. RUSBERRY AND H. STEWART, APPELLANTS.

MECHANIC'S LIEN ASSIGNABLE.—Although the right to perfect a lien by filing notice, under the Act concerning liens of mechanics, is a privilege to be exercised by the person performing the labor or furnishing the materials, when the lien is perfected it is assignable.

APPEAL from Baker County.

This suit was brought by Brown, assignee of Starr and others, to foreclose mechanic's lien, procured by them and

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26	197
41	1103
4	89
34	121

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assigned to Brown, for labor and material furnished Harper & Rusberry, and for the sale of property for the benefit of plaintiff, and also to cut off a similar lien of Stewart's for labor and material furnished to aid Harper & Rusberry.

Defendants filed a general demurrer, which was overruled and judgment given for plaintiff. Other proceedings, but having no important bearing in the case, were had in the Court below.

R. A. Pierce and C. G. Curl, for Appellants.

A mechanic's lien is a personal right, and not assignable without special authority in the statute. (*Caldwell v. Lawrence*, 10 Wisc. 331; *Pierson v. Ficher*, 36 Me. 384; 2 Washb. Real Prop. 563; Houck on Liens, 205; *Roberts v. Fowler*, 3 E. D. Smith, 632; Mis. Laws, ch. 32, § 10.)

I. D. Haines, for Respondent.

Choses in action are assignable. (Cal. Prac. Act, 5; 18 Cal. 127; 12 Cal. 98; 13 Cal. 123; 2 Kern. 625.) Mechanics' liens are assignable. (3 E. D. Smith, 632; 20 U. S. Digest, 101, §§ 8, 9.) Liens of material-men are assignable. (1 Estee Pl. 73; 4 Abb. Dig. 4, § 10.) Must be assigned in writing. (7 Cal. 389.) Is in the nature of a mortgage. (Cal. Dig. 722.)

By the Court, UPTON, J.:

This is an appeal from a judgment or decree foreclosing mechanics' liens. The point of objection made by the appellant is that the complaint does not state facts sufficient to constitute a cause of action or suit, in that the plaintiff sues as assignee, and that liens for labor and material under the statute (Mis. Laws, ch. 32) are not assignable.

Notices of these liens were filed by parties performing the work and furnishing the materials, and they were assigned to the plaintiff after the liens were perfected. The authorities cited by the appellant sustain the position that under statutes similar to ours the lien cannot be perfected by an assignee,—and that seems to be fairly inferable from §§ 1 and 2 of our statute,—but I think none of these au-

thorities support the position that the perfected lien cannot be assigned.

The appellant claims that such assignment is inconsistent with the requirements of § 10 of the statute, and that the owners of the building have a right that satisfaction be entered by the original lien-holder. The language is, "Whenever any person *having* a lien by virtue of the provisions of this title shall have received" payment, he shall "enter satisfaction of his demands," etc. I do not think there is anything in this section conflicting with the idea of the assignability of the perfected lien. The cause of action for the work and material, aside from the lien, was assignable and might have been reached by garnishee process. If this demand had been levied upon by a creditor before assignment but after the lien was perfected, I cannot think such an indebtedness for work and material, when transferred by judicial sale, or enforced by decree for the benefit of the creditor, would be treated as divested of the character of a lien. I think there is nothing in the statute that necessarily leads to the conclusion that a perfected lien is not assignable.

The authorities cited by the appellant treat the *right to assert and perfect* the lien as a personal privilege not transferable. So our statute provides "that any person who shall" * * * "perform labor," etc., shall have a lien upon filing the notice, etc.; and "any *person* wishing to avail *himself* of the provisions of this title," * * * "shall file," etc. I think when he has availed himself of these provisions and his rights have become settled and vested, there is no longer an occasion for exercising his personal option, and his rights are no longer in the nature of a privilege that must be exercised or enjoyed by him personally in order to be valid.

The record, as presented by the transcript, is somewhat incomplete in not showing the time of filing some of the motions passed upon by the Circuit Court, and it is therefore difficult to determine whether the defendant was in default or whether he was entitled to a hearing on the demurrer, or to say whether this should be deemed a judg-

Statement of Facts.

ment for want of answer, and consequently not appealable. But, as upon the merits presented by the demurrer, we should arrive at the same conclusion that was reached in the Circuit Court, these questions become immaterial for the purposes of this cause.

The decision of the Circuit Court should be affirmed.

W. C. FOREN, RESPONDENT, v. DAVID DEALEY,
APPELLANT.

SUFFICIENT ANSWER.—If an answer puts in issue the material facts it is sufficient.

STRIKING OUT AN ANSWER.—To justify striking out an answer as false and therefore sham, it must be obviously false or false in fact and pleaded in bad faith.

SHAM ANSWERS.—Sham answers are such as are good in form, but false in fact and pleaded in bad faith.

VAGUENESS IN PLEADING.—Mere vagueness in pleading must be corrected by amendment and not visited by judgment.

APPEAL from Baker County.

The action is upon a promissory note for one hundred and fifty dollars and interest, which purports to be for value received. The complaint sets out a copy of the note, alleges its execution and delivery, and alleges that no part of the said promissory note or the interest thereon has been paid. That there is now due and owing to said plaintiff from said defendant on said promissory note the sum of one hundred and fifty dollars in gold coin, together with interest in like gold coin on said one hundred and fifty dollars at the rate of twelve per cent. per annum from February 28, 1867.

The answer admits the execution and delivery of the note, but alleges that it was without any consideration; that a day or two prior to the execution of the note, plaintiff and defendant had an accounting and final settlement of all matters between them; that at such settlement a balance was struck and there was found due defendant from plaintiff upwards of one hundred and eighty dollars; that there has been no dealings between the parties since said settle-

4	92
27	236
4	92
40	556

Argument for Respondent.

ment, and that defendant is not indebted to plaintiff on said note in any sum whatever. The answer further alleges that immediately after the settlement the plaintiff refused to pay the defendant the amount found due, but then and there demanded that defendant should make and deliver the said note; and threatened that if the defendant refused to deliver the same the plaintiff would cause the arrest and imprisonment of the defendant. And the defendant believing and fearing that the plaintiff would carry his threat into execution, did on account thereof and without consideration make and deliver said note to the plaintiff. That there was no legal or equitable cause or right for said threatened arrest and imprisonment. That it was from fear of said threats, which were malicious and wanton, and not for any consideration, that he executed said note. *And that he told the plaintiff* at the time that he would not pay the note.

On motion of the plaintiff the answer was struck out and judgment was rendered for the plaintiff.

R. A. Pierce and C. G. Curl, for Appellant.

Want of consideration is a good defense in an action of this kind. (1 Pars. on Con. 249, 250, Ed. of 1864; 3 Kent. Com. 103, Ed. of 1860; *Jenkins v. Schaub*, 14 Wisc. 1; *Stillwell et al. v. Kellogg et al.*, 14 Wisc. 461; Story on Notes, §§ 181 to 190. Fear of imprisonment is duress and a good defense. (*Whitefield v. Longfellow*, 13 Me. 146; 1 Pars. on Con. 392, Ed. of 1864; 2 Kent. Com. 610, note "b," Ed. of 1860; 5 Hill's R. 154; Duress, Bouv. Law Dict.)

I. D. Haines, for Respondent.

The answer is sham. Making the note was a new dealing. (12 Cal. 171; 14 Cal. 509; Van Sant Pl. 603; 6 Cow. 34.)

It was a note given after a settlement. Counter claim is not well plead. (Van Sant Pl. 400, 579, 603; 15 Barb. 360.)

The allegations of fear, threats of arrest, etc., are sham defenses, shown false by the amended answer, which says that when the defendant signed the note he told the plaintiff that he would not pay it, which does not show fear.

Opinion of the Court—Upton, J.

It is not shown by stating facts that the plaintiff had no right to arrest defendant. Facts should be stated. (Van Sant Pl. 302, 467; 5 Cal. 160; 18 How. 306; 6 Mass. 500.)

Fraud, duress. (27 Cal. 166; 2 Estee Pl. 674; 19 How. 69; 2 Block, 499.)

By the Court, UPTON, J.:

The only question presented arises upon an order striking out the answer and rendering judgment for the plaintiff. Evidently there are parts of the answer which, if they are unqualified by the other parts, amount to a defense.

"If an answer puts in issue the ultimate facts resulting from the evidence, it is sufficient. (*Moore v. Murdoc*, 26 Cal. 524.)

But it is claimed by the respondent's counsel, and seems to have been held by the Circuit Court, that all the direct statements of the answer which would have been available, are rendered useless by qualifications and contradictions. If a defendant sets up that no consideration was given, and in a second defense sets forth the circumstances under which the note was given, the first branch of the answer will be interpreted by the second. (*Kyle v. Harrington*, 4 Abb. Pr. 42.) And if it appears from the circumstances that there was a consideration, the first defense, although direct and positive, will be of no avail.

This is but an application of the general and familiar rules of pleading, that a pleading must not be contradictory, and that a party is bound by the admissions in his pleading.

We have only to examine the answer and ascertain whether it contains any admission of a consideration or makes any statement inconsistent with the plea that the note was given without consideration. The answer contains many redundant statements in regard to the defendant's affairs and the members of his family which could not possibly aid his defense or serve any beneficial purpose; but we do not find in this array of circumstances any statement that flatly contradicts the plea that there was no consideration for the note. Nor do the allegations, taken as a whole, show that the note must have been founded

Opinion of the Court—Upton, J.

upon sufficient consideration. The circumstance that the parties met a day or two before the note was made "and accounted, reckoning all things theretofore existing in deal between them, and struck a balance," is not entirely inconsistent with the first plea. The same may be said of all the circumstances detailed in the answer; notwithstanding all that is set out, it is not impossible that there was an ascertained balance due to the defendant, and he may have been induced by threats to give the note without any good or valuable consideration, for aught that appears in the circumstances detailed. No affidavit was filed upon which the Court would act, as was done in the case of *Brewster v. Bostwick* (6 Cow. R. 34).

The argument of the respondent assumes that the Court can decide upon the truth of the plea, and declare an answer sham upon mere probabilities. Thus he claims that the allegations in regard to the accounting render it improbable that the account was settled, or that no money was due to the plaintiff, and that the defendant's assertion, made at the time he signed the note, that he would not pay it, renders it improbable that he was intimidated, or that he signed the note through fear of arrest; but I think this assumption untenable. When an answer is objected to as false, and therefore sham, the Court should not proceed upon probabilities, but to justify striking out an answer on this ground it must be obviously false, or it must be shown to be false and in bad faith. "Sham answers are such as are good in form, but false in fact, and pleaded in bad faith." (*Gostorf's v. McCahill & Co.*, 18 Cal. 385; *Piercy v. Sabin*, 10 Cal. 22.) None of the numerous authorities cited by the respondent, justify a Court in striking out an answer, and rendering a judgment on the merits, upon a mere suspicion of untruth; nor in rejecting an answer as contradictory, and thus terminating the case, unless the statements alleged to be contradictory are entirely inconsistent with the truth of the defense that is well plead. It cannot safely be asserted from an inspection of this answer that it could not have been established on the trial that the note was without consideration. If the truth of the matter rested

Opinion of the Court—Boise, J.

on probabilities, this entitled the party to a trial. It was, therefore, error to render a final judgment for the plaintiff.

So much irrelevant and redundant matter is contained in the answer, and intermingled with that which is material, that it encumbers the case, and there is much reason to think the Court might well have made the order striking out the answer, at the same time granting leave to amend upon terms; and if the terms were not accepted, might have rendered this judgment; but these defects do not warrant a judgment without an opportunity to defend.

"Mere vagueness in pleading is to be corrected by amendment, and not visited by judgment." (*Kelly v. Barnett*, 16 How. Pr. R. 135; *Struver v. Ocean Insurance Company*, 9 Abbott Pr. R. 23.)

The judgment should be reversed and a new trial granted.

JOHN O'RILEY AND MARY O'RILEY, APPELLANTS, v.
JOHN WILSON, RESPONDENT.

PLEADINGS—SUFFICIENCY OF A DENIAL.—Where in an action for the recovery of damages, the defendant pleads accord and satisfaction, and the replication denies that "in consideration of the payment of seventy-five dollars, or any other sum and the surgeon's fee," mentioned in the answer, the plaintiffs "accepted the same in full satisfaction and discharge of the damages," etc.: *Held*, that while this is an admission of the payments, it is a denial of their acceptance in discharge of the damages claimed, and, therefore, a sufficient denial of the settlement set up in the answer.

THE facts are stated in the opinion of the Court.

S. Huelat, for Appellants.

Page & Thayer, and Johnson & McCown, for Respondent.

By the Court, BOISE, J.:

This was an action brought by the plaintiffs to recover damages accruing to the plaintiff, Mary O'Riley, from the falling of certain seats, erected by the defendant at his circus, whereby the plaintiff was injured.

The defendant, in his special answer, says:

"Defendant, for further answer, avers that after the committing and happening of the alleged and supposed grievances and acts, in the complaint mentioned and before this action, to wit, on the said 20th day of September, 1869, the defendant delivered to the plaintiff seventy-five dollars in coin, and paid the surgeon's bill for attendance upon the said Mary O'Riley, and in consideration of such payment to the surgeon the plaintiffs accepted and received the sum of seventy-five dollars aforesaid, in full satisfaction and discharge of the damages or liabilities in the complaint mentioned, and of all the damages by the plaintiffs sustained by reason of the matters and things therein alleged."

To this answer the plaintiffs reply:

"That it is not true that plaintiffs, in consideration of the payment of the sum of seventy-five dollars, or any other sum, and the surgeon's fee for attendance upon plaintiff, Mary O'Riley, accepted the same in full satisfaction and discharge of the damages or liabilities in the complaint mentioned and set out, and of all the damages by the plaintiffs sustained by reason of the matters and things in said complaint alleged, and plaintiffs deny that they have ever received from any person or persons compensation or satisfaction for the injury and damages in the complaint in this action set out."

The general allegations of the complaint were also denied. A trial to a jury was had, and a verdict for the plaintiffs rendered, when the defendant moved for judgment, notwithstanding the verdict; which motion was allowed, on the ground that the replication did not deny the accord and satisfaction pleaded in the special answer of the defendant. And the question to be determined by this Court is, does the replication put in issue the allegations of said special answer?

The answer says that defendant paid the surgeon's fees and paid the plaintiff seventy-five dollars, which was accepted as a full settlement and satisfaction by the plaintiffs.

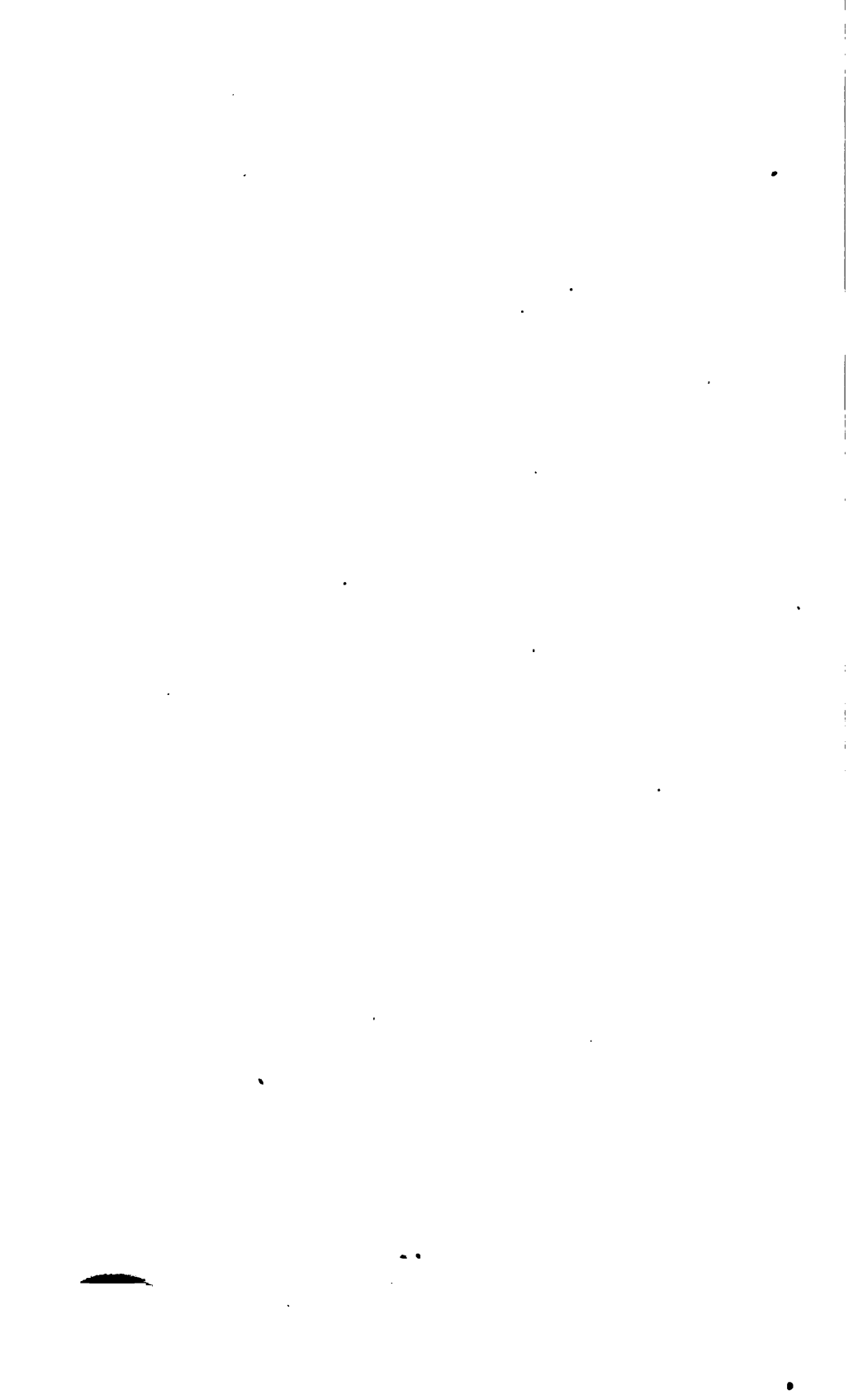
The reply does not deny the receipt of the money or the payment of the surgeon's fee, which is therefore admitted;

Opinion of the Court—Boise, J.

but plaintiffs say that it is not true that they accepted the same in full satisfaction and discharge of the damages or liabilities in the complaint mentioned. It is insisted that it is not sufficient to deny an allegation to be to the effect, as mentioned in the pleading replied to, but that the denial must show that there has been no settlement whatever. This is not a denial of a conclusion of law. A certain fact is set out in the answer, to wit: That the payment of the surgeon's fee and the payment of seventy-five dollars were accepted by the plaintiffs as a full settlement of the damages; that is to say, that such was the contract and the consideration thereof. Plaintiffs deny that they ever made any such contract. I think this is the denial of a fact, and not the pleading of a conclusion of law. It is not a denial of the defendant's conclusion of law, but it is the denial of the fact that there was any agreement such as the defendant has alleged. To say that a certain sum was accepted is stating a fact, and to deny it is to deny a fact. We think the replication makes an issue of fact with the answer on the question as to whether there was an acceptance in discharge of damages or not.

Judgment reversed.

SEPTEMBER TERM, 1871.



REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
SEPTEMBER TERM, '1871.

4	101
6	440
4	101
a26	380
38*	306

R. H. MOORE, RESPONDENT, *v.* THOMAS FLOYD
ET AL., APPELLANTS.

INSTRUCTIONS.—In an action against a sheriff for failing and refusing to levy upon property sold by the judgment-debtor prior to the execution, and remaining in his possession, the Court instructed the jury that the title to the property so sold was in the judgment-debtor, and that such property was subject to the execution: *Held*, that the instruction was error. It should have been left to the determination of the jury whether the sale was made in good faith or not.

BURDEN OF PROOF.—When a sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded in the writ, it will be presumed that the plaintiff in the execution has suffered the loss of his debt, until the contrary is shown by the officer, upon whom the burden of proof rests.

APPEAL from Jackson County.

The facts are stated in the opinion of the Court.

J. F. Watson, C. W. Kahler, and Hill, Thayer & Williams,
for Appellants.

B. F. Dowell and W. R. Willis, for Respondent.

By the Court, THAYER, J.:

This was an action in favor of the plaintiff, R. H. Moore, against the defendant, Thomas Floyd, former Sheriff of Josephine County, and the sureties on his official bond, to recover damages for an alleged neglect of duty as such Sheriff. The action was tried before a jury, who returned a verdict for the plaintiff for the sum of \$3500, of which the plaintiff remitted the sum of \$291, and judgment was given in his favor, and against the defendants, for the balance, \$3209 and the costs, from which the defendants appeal to this Court.

The plaintiff claimed that on the 21st day of February, 1867, he caused an execution to be issued upon a judgment in the Circuit Court for the County of Josephine, in his favor, and against one George E. Briggs, and delivered the same to said Floyd, as such Sheriff, for service. That Briggs, the defendant in said execution, was at the time owner and in possession of certain property sufficient to satisfy the said execution, which fact was known to said defendant Floyd, and that he failed and refused to levy upon the same, or any other property, until after the return day of said execution. All of which allegations were denied by the defendants.

The plaintiff gave evidence upon the trial tending to show that said George E. Briggs was the owner and in possession of certain personal property, consisting of live stock of sufficient value to satisfy the execution, and that Floyd had not levied upon the same, or upon any property, until after the return day of the execution, and that he had not made any part of the money required thereby to be collected.

The defendant gave evidence tending to show that said George E. Briggs had, prior to the issuance of said execution, sold the said personal property to one George H. Briggs, and received his pay therefor. The defendant's counsel claim that the Court erred in the instructions to the jury in several particulars; and also in refusing to instruct as requested by defendant's counsel. We have ex-

amined the bill of exceptions carefully, and regard only two of the points as at all questionable.

The plaintiff could undoubtedly maintain an action in such a case against a sheriff and his sureties. The statute gives a right of action for such official neglect in favor of a party who has been injured thereby, for the recovery of his damages. (Civ. Code, § 238.)

Among the instructions given by the Court to the jury was the following:

“If the jury find that the personal property mentioned in the complaint was sold by George E. Briggs to George H. Briggs, but was not actually delivered, then the title was in George E. Briggs and subject to the execution.”

This instruction was duly excepted to by the defendant's counsel, and is now claimed to be erroneous. It appears that the question in the Court below was as to whether the sale claimed to have been made by George E. Briggs to George H. Briggs was in good faith or not, and in that view of the transaction the instruction was given as above stated. The effect of the instruction was, that under the circumstances of the case, George E. Briggs, being in debt to Moore, a sale of his property to George H. Briggs, without being followed by an actual delivery, would be fraudulent and void as against Moore. There is no doubt but that a transaction of this character, under such circumstances, would be very strong evidence of fraud. When a debtor sells personal property and retains possession thereof, it is, as against his creditors, presumptive evidence of fraud. But can the Court determine, as a matter of law, that it is fraudulent? This question has never been fully settled by the Courts. We have a statute, however, which provides that every sale of personal property, * * * unless the same be accompanied by an immediate delivery, * * * creates a presumption of fraud as against the creditors of the seller, * * * disputable only by making it appear that it was made in good faith.” (Civ. Code, § 40.)

The Circuit Court should have left it to the determination of the jury, whether the sale was made in good faith or not. From the instructions as given, the jury was re-

Opinion of the Court—Thayer, J.

quired to find that the title was in George E. Briggs, provided they found that the property was not actually delivered. The jury would not be justified in so finding under such a state of facts, if it appeared that the sale had been made in good faith, and there was evidence given upon the trial, as shown by the bill of exceptions, tending to prove that the sale was made in good faith. The instruction given, without the qualification suggested, was erroneous. (See *Hanford v. Archer*, 4 Hill, 271.)

This is sufficient to dispose of the case; but as it has to go back for a new trial, it becomes necessary for this Court to pass upon another question. The defendant's counsel in the Court below requested the Court to instruct the jury, that if they found that defendant Floyd neglected to return the execution within the time required by law, and that no damages resulted to plaintiff on account of said failure, then the plaintiff is entitled to only nominal damages for such failure. This instruction was refused and an exception taken to such refusal. The instruction should have been given. The action was to recover damages, and certainly the plaintiff should recover no more than his actual damages, unless the neglect of the officer had been willful, in which case exemplary damages might be recovered against him. I am not aware that any of the authorities go beyond this, although there has been a great diversity of opinion as to what should be the rule of liability in such cases.

The conclusion this Court has arrived at upon the point last referred to is: That where a Sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded by the writ, *prima facie* the plaintiff in the execution has lost his entire debt, and the burden of proof is upon the Sheriff to show to the contrary. The Sheriff may mitigate the damages by proving the extent of the loss the plaintiff in the execution has suffered, by showing that the execution debtor was insolvent, or any fact which would legally tend to show the actual amount of damages the plaintiff had sustained. Upon this point we are inclined to adopt the rule laid down in *Stevens v. Rowe*

Argument for Appellant.

(3 Denio & N. Y. R. 327), although it seems to have been questioned by later decisions of that State.

Judgment reversed and new trial ordered.

JAMES ANDERSON, APPELLANT, v. T. J. BAXTER,
RESPONDENT.

MORTGAGE—SUIT TO FORECLOSE IS NOT FOR THE DETERMINATION OF ANY RIGHT OR CLAIM TO OR INTEREST IN REAL PROPERTY.—A suit to foreclose a mortgage is not for the determination of any right, or claim to, or interest in real property, within the meaning of § 378 of the Civil Code. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it.

STATUTE OF LIMITATIONS.—The absence of a mortgagor from the State will not prevent the Statute of Limitations from running on the mortgagee's right to foreclose. Equity acts by analogy to the rules of law. A suit of foreclosure is in effect a proceeding *in rem*. There is no analogy in the application of the Statute of Limitations between such a proceeding and actions at law.

EFFECT OF POSSESSION.—A mortgagee or his assignee in possession occupies a position, in a suit to foreclose, no more favorable than if out of possession.

PAYMENT—WHAT IS, TO TAKE A SUIT OUT OF THE STATUTE OF LIMITATIONS.—A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off or counter-claim, which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the Statute of Limitations from running.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Mallory & Shaw and E. D. Shattuck, for Appellant.

The receipt of the rents and profits of lands by a mortgagee or his assignee in possession, is payment *pro tanto* of the money due on the mortgage. (Powell on Mortgages, 225-228; *Waring v. Smyth*, 2 Barb. Ch. R. 135; *Shaler v. Signer*, 44 Barb. 614; 4 Kent, 166.)

Unless a period of ten years has elapsed since the last rents and profits were received, the statute has not run against the mortgage. (Civ. Code, §§ 24, 25; Powell on Mortgages, 249, 250.)

4	106
4	222
7	321
21	176
22	131
22	138
27*	950
29*	198
30*	206

4	106
27	47

4	106
38	169
38	256

4	106
47	152

4	106
48	520

Argument for Respondent.

A mortgagee or his assignee in possession of mortgaged premises may defend that possession until the debt secured by the mortgage is paid, either from the rents and profits, or by the mortgagor, or by some one for him or representing his interest. The provision of the Code denying to the mortgagee the right to his action of ejectment for the possession without a foreclosure and sale (Civ. Code, § 323) does not deprive him of his right to defend his possession under his mortgage when obtained by lawful means. (*Jackson v. Winkler*, 10 John. R. 480; *Jackson v. Bowen*, 7 Cow. R. 20, 21; *Jackson v. Meyers*, 11 Wend. 538, 539; *Van Duyne v. Thayer*, 14 Wend. 234; *Phyfe v. Riley*, 15 Wend. 248; *Watson v. Spence*, 20 Wend. 263; *Waring v. Smyth*, 2 John. Ch. 135; *Casey v. Buttolph*, 12 Barb. N. Y. 638; *St. John v. Bumpstead*, 17 Barb. N. Y. 102; *Monroe v. Merchant*, 26 Barb. N. Y. 406; *Mickles v. Townsend*, 18 N. Y. 584; *Chase v. Peck*, 21 N. Y. 586; *Smith v. Garder*, 42 Barb. N. Y. 364; 44 Barb. N. Y. 613; *Ruch v. Hall*, 1 Smith's L. Cas. 816; *Dutton v. Warschauer*, 625.)

A mortgagee in possession has an interest in the premises which he has not when not in possession. In possession, he is entitled to rents and profits, and may defend his possession against the mortgagor and those claiming under him. (Powell on Mortgages, 235; *Dougherty v. Randall*, 3 Mich. 581; 21 N. Y. 343.)

Williams & Willis, for Respondent.

A mortgage creates no right to or interest in the land mortgaged. It is only a lien thereon, similar in character to the liens created by judgments generally. (Session Laws 1870, 265; 9 Cal. 411; 39 Cal. 247; 3 Denio, 234; 21 N. Y. 347; 6 Conn. 161.) The time that the mortgagor resides out of the State is deemed a part of the period of limitations. (Id.) Possession by the mortgagee, without the mortgagor's consent, does not operate to enlarge the mortgagee's rights. (Civ. Code, § 323; 9 Cal. 411, 428; 17 Cal. 593; 36 Cal. 42, 52.)

By the Court, THAYER, J.:

This is a suit by the appellant, James Anderson, as plaintiff, to foreclose a mortgage upon certain real property situated in the county of Marion. The complaint was filed on the — day of April, 1870. The respondent, T. J. Baxter, defendant in the Court below, demurred to the complaint on the grounds that the suit had not been commenced within the time limited by the Code. The Circuit Court overruled the demurrer, and the defendant appealed from the decision to this Court. The appeal was heard at the term of this Court held in the year 1870, and the decision of the Circuit Court upon the demurrer was reversed and the cause remanded to the Court below for further proceedings.

The case coming on to be heard in the Circuit Court upon the mandate of this Court filed there, judgment was given in favor of the defendant and against the plaintiff for the costs and disbursements, and the plaintiff, by leave of that Court, filed an amended complaint in the suit, to which the defendant interposed a demurrer upon the same grounds as before. The Circuit Court, at a term thereof held in January, 1871, regarding the decision of this Court upon the former appeal as decisive of the question raised by the demurrer to the amended complaint, sustained the same and gave judgment for the defendant, from which the plaintiff brings this appeal.

The only question we are necessarily required to consider is, whether or not the amended complaint referred to presents a state of facts that takes the case out of the principles of law determined by this Court upon a former appeal.

But as no opinion was then written, it has been deemed advisable to give at this time the opinion of the Court upon the questions determined in this case at the former term as well as those now submitted for our consideration.

The plaintiff alleges in his complaint, in substance, that on the 14th day of October, 1857, one William H. Nordyke and wife sold and conveyed, by deed of that date, the real property in question to Nathan Howe and Horace Howe,

Opinion of the Court—Thayer, J.

Jr. That said Howes on the same day executed to said Nordyke a mortgage upon said property to secure eighteen hundred dollars of the purchase-money thereof, conditioned to be paid in two installments of nine hundred dollars each, in one and two years from date, with interest. That the mortgage contained a clause that until default by mortgagors in the performance of said condition, it should be lawful for them to retain the possession of the said property and to use and enjoy the same. That mortgagors wholly failed to pay the money or interest secured to be paid by the said mortgage, and abandoned the said mortgaged premises and went out of the (then) Territory (now State) of Oregon, and have continuously ever since remained out of said possession and absent from the State.

That after the default in the payment of said money, the said Nordyke, the mortgagee, entered and took peaceable possession of said premises under his said mortgage, and being so in possession thereof, he, on the 12th day of May, 1859, in consideration of twenty-two hundred dollars, sold and assigned the said mortgage to the plaintiff, which assignment was, at or about the day aforesaid, duly acknowledged and recorded; and the said mortgagee then and there delivered said mortgage, and the possession of the said premises, to said plaintiff, who then and there peaceably entered and has continuously ever since remained in the quiet and undisturbed possession thereof to the present time, and has received the rents and profits thereof, paid the taxes and other necessary expenses for repairs, and made valuable improvements thereon, an account of which was set forth in said complaint, in a bill of particulars, in which the mortgagors were credited for the use of the premises for each year, and were charged with the taxes paid, and the expense of improvements.

The plaintiff also alleges, upon information and belief, that said Horace Howe, Jr., died out of the State about the year 1862, or 1863; that he left no will, and no widow or children, and that Horace Howe is the father, and the only surviving heir-at-law of the said Horace Howe, Jr.; that on or about the 11th day of March, 1870, said Nathan Howe,

Opinion of the Court—Thayer, J.

and his wife, and the said Horace Howe, for the consideration of one hundred and fifty dollars, conveyed, by quit-claim deed, all their right, title and interest in the said premises, to said defendant T. J. Baxter, who took, with full notice of plaintiff's mortgage, possession and rights in the premises. The plaintiff also sets out in the complaint a copy of the mortgage; but it is not alleged, nor does it appear, that any personal obligation for the payment of the debt was given by the mortgagors, or by the defendant; nor is there any covenant in the mortgage for the payment of the sum intended thereby to be secured.

Plaintiff prays relief, that said account be examined, and after ascertaining the balance due upon the mortgage, that the said premises be decreed to be sold and said balance and the costs and disbursements of the suit be paid out of the proceeds.

The question raised by the demurrer, is as to whether the suit has been commenced within the time limited by the Code of Civil Procedure.

Section 378 of the Civil Code provides that a suit shall be commenced within the time limited to commence an action, as provided in title second, chapter one, of the Code, and further provides, "That a suit for the determination of any right or claim to, or interest in real property shall be deemed within the limitation provided for actions for the recovery of the possession of real property."

Section four, title second of chapter one of the Code, provides that actions for the recovery of real property, or for the recovery of the possession thereof, shall be commenced within twenty years. And subdivision two of section five, title second, chapter one, provides that actions upon sealed instruments shall be commenced within ten years. The case at bar falls within these provisions of the statute, and it will readily be observed that if it is a "suit for the determination of any particular right or claim to, or interest in real property," the time is limited to twenty years. But if it is a suit upon a sealed instrument, and not for the determination of any right or claim to, or interest in real property, then it is limited to ten years.

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Formerly, a mortgage of real property was regarded as a conveyance of the legal title, subject, of course, to be defeated by the performance of a condition, and this doctrine still prevails to some extent. Courts of equity, however, have always regarded a mortgage as a mere security for a debt, and the foreclosure thereof as a proceeding to satisfy the debt secured thereby; and Courts of law as well as Courts of equity, in many of the States, have taken the same view; that is, that a mortgage was a mere lien or pledge, and that the general title to the mortgaged property was in the mortgagor. In the language of one of the authorities, "The mortgagee has neither a *jus in re* nor *ad rem*, but a specific lien, similar in character to a general lien created by a judgment upon the land of the judgment-debtor. (3 Denio, 232.) However this may be, as a matter of strict law, I am satisfied that a suit to foreclose a mortgage is not for the determination of any right or claim to, or interest in real property, but a proceeding to have the mortgaged property adjudged to be sold to satisfy the debt secured thereby; at least this is in accordance with the express provisions of our statute. (Civ. Code, § 410.) In such a suit the title to the mortgaged premises is in nowise drawn in question. The adjudication is merely as to the fact of the execution of the mortgage, the amount due thereon, and the sale of the property to satisfy the debt secured. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it. If it were a suit to divest a party of title, or to establish some right regarding the title to real property, it would stand upon a different footing; but the mortgage being in equity only a chose in action, a suit to foreclose it is more analogous to an action upon a sealed instrument, and should be governed by the same rule of limitation.

Another question which arises in this case is, whether the time the mortgagor, when the cause of suit shall accrue, or after it accrues, is out of the State, shall be deemed a part of the period of limitation.

Section sixteen, page 143, Civil Code, provides as follows: "If, when the cause of action shall accrue against

any person who shall be out of the State, * * * * such action may be commenced within the times herein respectively limited, after the return of such person into the State; and if, after such cause of action shall have accrued, such person shall depart from, and reside out of this State, * * * * the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." It is urged that the provisions of the above section should be made applicable to this case; that the time for the commencement of a suit being limited by § 374 of the Code, before mentioned, to the time for the commencement of an action, as provided by title second, chapter one, it must, in all cases, be taken with the qualifications contained in said title. I do not think that view a reasonable construction of the statute. The provision referred to, that a suit shall only be commenced within the time limited to commence an action, is a declaratory Act. A Court of equity always would refuse relief where, under like circumstances, the claim would be barred at law by the Statute of Limitations; although the statute, in terms, should be applicable to Courts of law only. Equity, in such cases, acts by analogy to the rules of law. (Story's Equity Juris. § 64.)

I cannot think the Legislature intended that the qualification referred to should apply, except where the circumstances are similar. If the relief sought had been a decree *in personam*, the analogy would be sufficiently complete, and the period of such absence not be included as any part of the time limited. Such absence in that case would suspend, or at least affect the party's remedy, which is the only reason for the exception. In this case, the plaintiff can claim no remedy, except to have the property in question adjudged to be sold to satisfy the debt secured thereby. It was in effect a proceeding *in rem*, and the absence of the mortgagors did not interfere with the prosecution of his remedy, or render it less effectual. If the absence of the mortgagors in this case prevented the Statute of Limitations from running, then the same result would have followed if the premises had been sold to defendant the next

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day after the execution of the mortgage, and he had gone into possession and remained in possession thereof; and in fact, the statute would never run so long as the mortgagors should remain away from the State. Where a personal obligation is sought to be enforced, the provisions of § 16 referred to, would undoubtedly apply; but where the only remedy is against the property, which has a fixed *situs*, the construction contended for would be unreasonable.

It is also claimed that as the mortgagee and his assignee, the plaintiff, took and retained possession of the mortgaged premises, after their abandonment by the mortgagors, and made improvements, and received the rents and profits, and used and occupied the same, it took the case out of the Statute of Limitations. That the mortgagors, and their grantee, the defendant, having the right to compel the plaintiff to account for such use and occupation, and to apply the same towards the payment of the debt, the plaintiff therefore has the right to make such application, and it will in effect be a payment, and bring the case within the provisions of § 25 of said Article Second. Said § 25 provides that, "whenever any payment of principal or interest has been, or shall be made, upon existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

I do not think we are called upon at this time to determine the rights of a mortgagee in possession, so far as his right to defend his possession until the debt secured by the mortgage is paid. That question does not properly arise at this time. Had this been an action by the mortgagors, or their grantees, to recover possession of the mortgaged property, it would have been pertinent, and the list of authorities, cited by the appellant's counsel upon that point, been entitled to consideration; but it is a suit to foreclose a mortgage, and the right to the possession, its being lawful or unlawful, is of no consequence. The view I take is: That a mortgagee, or his assignee in possession, in a suit to fore-

close the mortgage occupies no more favorable position than if out of possession; that his right to maintain possession under a mortgage, when he has lawfully acquired it, if he has such right, does not depend upon his having a remedy to foreclose the mortgage. His remedy, by action or suit, may be barred and still the obligation of the debt be unimpaired; that he might have the right to hold the property as a pledge, when he could not enforce a collection of his debt in an ordinary way. The Statute of Limitations only goes to the remedy by *action* or *suit*. (14 N. Y. 16.)

If a payment made by the mortgagor upon the mortgage debt, after the same becomes due, brings the case within the provisions of said § 25, and the limitation only commences from the time of such payment, yet I cannot regard the payment contended for by plaintiff's counsel as the kind of payment contemplated by the statute referred to. A payment by a debtor of a part of his debt is equivalent to a new promise to pay the debt. Such payment, however, must be the direct, voluntary act of the debtor. A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off, or counter claim which the debtor might insist upon, but which he has never claimed to have applied as such, cannot be regarded as such payment, and an application by the creditor of such matter as payment, without the assent of the debtor, would not prevent the running of the Statute of Limitations. Had the facts been, that the mortgagee went into possession under an agreement with the mortgagors that he should occupy the premises and apply the rents and profits in extinguishment of the debt and interest, the case would have been different upon that point. If the application of the rents had been under such an arrangement, expressly made between the parties, I think it would have been such a payment as I have indicated; but under the circumstances there has been no mutuality, no meeting of the minds of the parties, a mere *ex parte* application, and nothing upon the part of the mortgagors showing an intention to acknowledge a binding, existing obligation on their part.

The judgment of the Circuit Court should therefore be affirmed.

Statement of Facts.

THOMAS CROSS, APPELLANT, v. ELIAS CHICHESTER, RESPONDENT.

COSTS.—The decision of a Circuit Court determining the amount of costs taxable in a case, may be reviewed in the Supreme Court on appeal.

UNDERTAKING, WHEN TOO LATE FOR FILING.—If the undertaking on appeal is not filed within ten days after the service of notice of appeal, it is too late, and the cause will be dismissed unless leave is obtained to perfect the appeal.

LEAVE TO PERFECT APPEAL.—It is too late to apply for leave to perfect the appeal after the motion to dismiss is brought on for hearing.

AFFIDAVITS SHOULD BE FILED, WHEN.—Affidavits to be read in support of the cross motion should be filed before the motion is brought on for hearing.

COST-BILL.—In taxing costs the practice requires a cost-bill or statement of disbursements, which must state the items separately, specifying the amount of each item and for what the expense is incurred, and it must be verified.

IDEM—VERIFICATION.—Such verification is sufficient, if the party deposes that the items of the bill or statement are correct as the deponent verily believes, and that the liability has been necessarily incurred.

OBJECTION TO COST-BILL.—The written objection to the bill need not be on oath, but it must point out particularly the errors in the bill.

APPEAL from Lane County.

The appeal is from a judgment of the Circuit Court affirming a taxation of costs by the Clerk.

Before a hearing was had upon the merits of the cause a motion was submitted by respondent to dismiss the appeal upon these grounds:

First. The order, affecting only the taxation of costs, is not a "final decision."

Second. The undertaking was not filed within ten days after the service of the notice of appeal.

Pending the argument of the motion, counsel for appellant asked leave to perfect the appeal *nunc pro tunc*, and offered to file an affidavit in support of such request.

Upon the motion to dismiss, Upton, J., delivering the opinion of the Court, said:

"By the Constitution it is provided that 'the Supreme Court shall have jurisdiction only to revise the final decisions of the Circuit Courts.' We hold that a decision of

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a. Circuit Court finally determining the amount of costs taxable in a case is within this provision and is reviewable in this Court.

“On the second ground of the motion, the Court is of opinion that the undertaking was filed too late, it not being filed ‘within ten days after service of the notice of appeal;’ and that the motion must be granted unless leave be given to perfect the appeal.

“The appellant’s counsel, in the course of their argument on this motion, expressed a willingness to file a new undertaking and to apply for leave to perfect the appeal by that method if the Court thought a new undertaking necessary. We do not deem it a correct practice to entertain such a proposition made after the motion to dismiss is brought on for argument. The application for that purpose ought to have been made in the form of a cross motion, and if any affidavits were relied upon in support of the application, they should have been filed before the motion to dismiss was brought on for hearing, so that the whole matter would be presented for consideration. If the respondent insists on the second ground, the motion to dismiss will be granted.”

Respondent having filed an undertaking *nunc pro tunc*, appellant waived the second ground of his motion to dismiss and the cause was submitted on its merits.

Mallory & Shaw, for Appellant.

Ellsworth & Walton, for Respondent.

By the Court, UPTON, J.:

It appears from the transcript that the defendant filed with the Clerk, under § 546 of the Practice Act, a statement of his disbursements, the items of which were for witnesses’ fees, in which he specified the name of each witness and the amount of the disbursement, setting out each item in the following form:

“———, ——— days, ——— miles, \$———,”
giving the name of the witness, the number of days, the

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number of miles, and the amount claimed for each witness. The statement was verified.

The appellant filed the following objections:

“1st. It does not appear from said bill of disbursements or the affidavit thereto, that the persons therein named as witnesses actually and necessarily traveled the number of miles charged therein, or that they all or any of them actually attended the Court the number of days charged, as witnesses only.

“2d. It does not appear from said bill of disbursements that the defendant has paid, or is liable to pay to the persons named as witnesses, the amount therein charged.

“3d. It does not appear from said bill of disbursements that the said witnesses, or any of them, were material for the defense of this action; that they or either of them were sworn and examined in the trial.”

The respondent filed an amended verification to the bill of disbursements, whereupon the Clerk made an order allowing the bill, and the Circuit Court affirmed the order.

The only points it is necessary to consider in reviewing the decision of the Circuit Court, are whether the original statement of disbursements filed by the respondent, and its verification, were in compliance with § 546 of the Practice Act in the first instance, and whether the objections filed by the appellant “state the particulars of such objections” within the meaning of that section, as construed in the cases of *Crawford v. Abraham* (2 Oregon, 163), and *Wilson v. City of Salem* (3 Oregon, 482), so as to make it obligatory on the respondent to file an “amended verified statement.”

We think the original statement sufficient in the first instance; that is, it is such that if not objected to, it would have justified the Clerk in taxing the costs therein mentioned.

Where a disbursement is made to a witness, or incurred by calling him into Court and thus becoming liable to pay him, a statement of that disbursement is sufficiently explicit if it gives the name of the witness, the number of days he has attended the Court, the number of miles he has

traveled, and the amount of money he has become entitled to receive. And its verification is "as specific and formal as the verification to a pleading," and is sufficient if the party deposes that the items of the bill or statement are correct, as the deponent verily believes, and that the liability has been necessarily incurred. But we are of opinion that the objections filed by the appellant do not comply with the requirements of the practice, as established in the cases above cited.

When we compare the objections filed by the appellant in this case with those suggested by Judge Wilson in *Wilson v. City of Salem*, we find a marked difference. The latter specifies the particulars of the objection as follows: "C. D. did not attend as a witness only, but was a juror." The language of the objection in this case is, "*It does not appear from said bill of disbursements or the affidavit thereto, that the persons therein named as witnesses * * * actually attended Court the number of days charged, as witnesses only.*" The one presents an issuable fact in regard to the disbursement, and renders it necessary that the adverse party admit the truth by his silence, or deny the allegation by his oath. The other alleges no fact, but merely raises an issue of law as to the sufficiency of the original cost-bill.

If any one of these witnesses did not travel the number of miles charged, the objection should have named the witness, and should have stated that he did not travel as alleged. If the witness came on other business and did not travel or attend Court as a witness, the objection should state the fact. Such specification would point out at once what additional fact ought to be set out by affidavit, and would oblige the party claiming costs to file what has been called an "amended verification" or "an amended verified statement." In other words, an affidavit containing material facts, which are not shown in the original statement and which meet and traverse or avoid the particular matter specified in the objection, so as to put the Court in possession of all the material "facts necessary to show the justness of the claim."

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The appellant has objected to the sufficiency of the bill filed, but not to any item or claim, according to the meaning and intent of the rule as laid down in the cases above cited. In those cases it was held that, "if this is not done, the objection may be passed without notice and all items not objected to are supposed to be admitted."

The objections filed by the appellant seem to have been drawn up under the impression that, for the purpose of taxing costs, the papers to be filed must set out the facts which show the party to be entitled to recover as fully as a complaint sets out the facts that constitute a cause of action. Such is not the construction of the statute intended to be expressed in the opinions above cited. It is true Judge Wilson says: "Each *item* should be briefly but particularly set forth, just as in a complaint each cause of action must be specifically set forth and must of itself show a right to recover." This I understand to assert that each item must be stated separately so as to be distinguishable from all others, as each cause of action must be stated separately in a complaint, but as these papers do not necessarily constitute a judgment-roll or make up a record of what was the subject of the litigation as do the pleadings, there is not, in taxing costs, a necessity for the same kind of statement in all particulars that there would be in a complaint filed in an action to recover the same money that is here claimed.

In passing upon the cases above cited, the Court endeavored to fix upon a convenient mode of practice. The intention of the Court was not to assimilate this proceeding to the trial of a cause, but, on the contrary, to make the business of taxing costs as simple as is compatible with correctness and certainty. To this end the Court provided by rule that no affidavit should be filed, except by the party claiming the costs or disbursements. The practice which the Court has endeavored to establish requires, in the first place, simply a cost bill or statement of disbursements, which must state the items separately, specifying the amount of each item, and for what it is incurred, and must be verified. If any part of it is objected to, the objection need not be on oath, but it must point out particularly in what respect the claim presented is wrong or unfounded.

Statement of Facts.

As to any particular fact thus pointed out, the party who claims the item must state, on his oath, such additional facts, not stated in the original bill, as to present the truth in regard to the particular point specified in the objection, so that the Clerk, or the Court, by inspecting the original bill or statement, and the additional affidavit, sometimes called the "amended verified statement," can be informed of the truth of the matter pointed out in the objection. This is our understanding of the practice established by the cases above cited. We think the objections filed in this case are too general, and that they do not point out any particular respect in which the claim is unfounded, and that no additional verification was rendered necessary.

The judgment of the Circuit Court should be affirmed.

JOHN NEWSOM, APPELLANT, v. J. W. GREENWOOD,
RESPONDENT.

STATUTE—CONSTRUCTION OF.—A statute repealing or in anywise modifying the remedy of a party by action or suit, should not be construed to affect actions or suits brought before the repeal or modification.

REFORMING WRITTEN INSTRUMENT.—In order to warrant a Court of equity in decreeing the reformation of a written instrument, the testimony must be clear and satisfactory.

APPEAL from Marion County.

This was an action of ejectment, in which Newsom was plaintiff, and Greenwood defendant. Plaintiff filed his complaint, claiming a certain parcel of land in what is known as the Wesley Shannon Donation Claim, and also the sum of one hundred and seventy-five dollars as damages. The answer denies the ownership of plaintiff, and alleges that on March 9, 1865, the defendant purchased of one William Helm the south half of the prairie and south half of the timber land on said donation claim; that, by mistake, the deed from Helm to defendant was drawn for the south half generally; that on the 25th of March, 1865, the plaintiff, with full knowledge of the facts concerning the defendant's purchase, purchased from said Helm

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Argument for Respondent.

the remaining portion of said claim, viz.: the north half of the prairie, and the north half of the timber; that, by mistake, the deed from Helm to the plaintiff was drawn for the north half generally (which includes the parcel in dispute). That on December 15, 1866, defendant took possession of the land by him purchased. That when the plaintiff took possession of the land he recognized the division in accordance with their respective purchases, as alleged by the defendant. This answer developing an equitable defense, the cause was transferred to the equity side of the Court. To the defendant's answer, plaintiff replied, denying mistake in deed, and other material allegations. The Court below, after trial, found the equities to be with the defendant, and decreed accordingly. While the cause was pending, the Statute of 1866, by which actions at law were required to proceed as suits in equity, when the facts stated in the pleadings of either party presented a case requiring the interposition of a Court of equity, was repealed.

G. W. Lawson and Sullivan & Thompson, for Appellant.

The repeal of a statute, from which the Court derives its jurisdiction, at any time before the proceedings are consummated, deprives the Court of its jurisdiction, and puts an end to the proceedings. (1 Kent. Com. 526 and note; 1 Hill, 324; 36 Barb. N. Y. 447; 5 Blackf. R. 195; 2 U. S. Eq. Dig. 593; Smith's Com. 887; 1 Wm. Black. R. 451; Sedgwick on S. & C. L. 121; 23 Cal. 522; 2 Estee Pl. 277.)

The proofs are not sufficient to warrant the Court in correcting a mistake in the deeds. If the testimony is vague, uncertain, conflicting, or in anywise contradictory, a mistake will not be corrected, but the deed will be taken to express the exact terms of the agreement between the parties. (Willard's Eq. 70; Story Eq. 152-164; 42 Barb. N. Y. 455; 2 Johns. Ch. 585, 630; 11 Paige, 658; 33 N. Y. 676; 19 Cal. 660; 23 Cal. 522; 2 Estee Pl. 277; 29 Barb. N. Y. 595; 26 Wend. 268; 2 Ogn. 26, 290.)

Williams & Willis, for Respondent.

A Court, having acquired jurisdiction, does not lose it by

the repeal of a statute, under which such jurisdiction is acquired, while proceedings are pending. (Smith's Com. 880; 23 Wend. 481.) Jurisdiction of Courts of equity over questions of mistake. (Story Eq. §§ 157, 159; Willard's Eq. 73; 2 Ogn. 288; 10 N. Y. 322.)

By the Court, McARTHUR, J.:

Two questions are presented in this case: the one touching the jurisdiction of the Circuit Court; the other, touching the sufficiency of the testimony. After issue joined, and while this cause was pending in the Court below, the amendment to § 93 of the Code,—which amendment was couched in the following language: "A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleadings without leaving it insufficient. When the facts stated in the pleadings present a case cognizable in a Court of law, the case shall proceed as an action at law. But if the facts stated, either by the plaintiff or defendant, show a case requiring the interposition of a Court of equity, the case shall proceed as a suit in equity" (Laws of Oregon, 1866, p. 12),—was further amended so as to read as follows: "Section 93. A material allegation in a pleading is one essential to a claim or defense, and which could not be stricken from the pleading without leaving it insufficient as to such claim or defense." (Civ. Code, § 93.)

This case was commenced on the law side of the Court, and the answer developing an equitable defense it was transferred to the equity side, and then tried, the transfer being ordered and the judgment rendered after the repeal of that part of § 93 which established such rule of practice. Wherefore it is contended by counsel that the Court had no jurisdiction to transfer or try the cause, for that the proceedings were inchoate at the time of such repeal, and there was no saving clause as to the causes pending.

As a general rule, it is true that the effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been passed, and that it must be considered as a law that never existed, except for the purpose of those

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actions or suits which were commenced, prosecuted and concluded while it was an existing law. Such was the language of Tindal, Lord Ch. J., in *Key v. Goodwin* (4 Moore & Payne, 341, 351), and such is the recognized rule in this country. But there is a class of cases forming exceptions to this general rule. In *Hitchcock v. Way* (6 Adolphus & Ellis), a case similar in principle to the one now under consideration, Denman, Lord Ch. J., in delivering the opinion of the Court, said: "We are of opinion that the law as it existed when the action was commenced, must decide the rights of the parties to the suit, unless the Legislature express a clear intention to vary the relations of litigant parties to each other." Upon the same principle was decided the case of *Butler v. Palmer* (1 Hill, 325), in which it was very emphatically declared that positive enactments are not to be construed as interfering with previously existing contracts, rights of action, or suits, unless the intent thus to interfere be expressed in the enactment. Extending this principle, it was held in *Bedford v. Shilling* (4 Serg. & Rawle, 401), that a statute in any way modifying the remedy of a party by action, shall never be so construed as to affect actions brought before the statute. Also, in *Bates v. Starns* (23 Wendell, 482), it was decided that a statute should never be so construed as to affect even pending remedies, unless it either expressly declare such to be its object, or there remains no prospective remedy upon which it can operate. We recognize and shall follow the principle governing in the exceptional cases, as well because it is sanctioned by approved precedents, as because it is calculated to prevent the evils which would result from the too rigid application of the general rule. Applying it, therefore, to the question of practice presented, we conclude that the Court below very properly transferred this cause from the law to the equity side, and that it had jurisdiction to try the same after the repeal of the section of the Code above referred to.

We now proceed to the second question presented. Since the amendment of § 533 of the Code (Civ. Code, § 533), appeals from decrees are to be tried *de novo* by this Court, upon the transcript and the evidence accompanying it. All

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the testimony is therefore before us; and the respondent's counsel claim that the conclusions of fact to be drawn therefrom, warranted the Court below in decreeing the correction of the deed and the division of the parcel of land described as the Wesley Shannon Donation Claim, in accordance with the terms of an alleged contract of purchase which is assumed to be fully proven. Appellant's counsel, however, urge that the proofs are not sufficient to warrant the Court in concluding that there was a mistake in the deed and proceeding to correct the same.

A brief inquiry into the laws relating to the quality and character of the testimony necessary to warrant a Court of equity in decreeing the correction of a mistake in a deed will not be amiss. In *Shively v. Welch* (2 Oregon, 290), Kelsay, J., in delivering the opinion of the Court, said: "To entitle a party to the decree of a Court of equity reforming a written instrument, it is incumbent upon him to establish the error or mistake alleged by proof so satisfactory in its nature as to preclude all question."

The language used by the learned judge is far too strong. To hold that proof in these, or in any cases, shall be so satisfactory as to preclude all question, would defeat the object of the law, for it seldom lies within the range of human possibility to furnish that quality of proof. The rule which should govern in this class of cases is laid down in Willard's Equity Jurisprudence, page 75, where it is held "that to show a mistake in a written instrument, the evidence must be clear and satisfactory, so as to establish the mistake to the entire satisfaction of the Court." And this is identical with that expressed by both Fonblanque and Story, and has received the approval of the highest judicial tribunals of the United States and of England.

The testimony before us does not fill the measure of the rule just stated, much less that laid down in *Shively v. Welch*, and is not of that clear and satisfactory nature requisite to warrant us in reforming a written instrument.

The decree of the Circuit Court must, therefore, be reversed, and a decree entered in conformity with this opinion. Decree reversed.

Argument for Appellant.

N. G. PITZER, APPELLANT, v. W. J. RUSSEL,
RESPONDENT.

RIGHT TO SUE UPON A JUDGMENT.—A judgment creditor cannot claim a strict right to sue upon his judgment as often as he may choose, without showing any necessity for such course. Neither the common law nor the practice in the various States, nor anything inherent in the subject, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

COMPLAINT IN AN ACTION UPON A JUDGMENT.—Where a judgment creditor had neglected for more than one year to file a transcript of his judgment with the County Clerk and had thereby lost his power to levy on real estate, and the complaint contained no explanation of the delay: *Held*, not to be error to decide that the complaint did not lay a foundation for an action upon the judgment.

APPEAL from Benton County.

This action was brought in the County Court of Benton County by the appellant, upon a judgment obtained by him before a Justice of the Peace in Grant County in this State. The complaint states that the defendant was indebted to the plaintiff, on the 22d of October, 1863, in the sum of \$154.80, for which he gave his promissory note; and it sets out the proceedings in the former action, in which, on the 4th of April, 1866, the plaintiff obtained judgment upon the promissory note for want of answer, and it avers "that the same judgment is in full force, having never been paid or reversed," and that the defendant is now a resident of the county of Benton, owns no personal property, but does own real estate in Benton County.

The defendant demurred, assigning as cause: "1st. That it appears from the complaint that the Court has no jurisdiction of the subject of the action. 2d. The complaint does not state facts sufficient to constitute a cause of action."

The County Court sustained the demurrer. The plaintiff having appealed to the Circuit Court, the judgment of the County Court was affirmed, and the plaintiff now appeals to this Court.

F. A. Chenoweth, for Appellant.

A judgment was at common law a good cause of action.

Opinion of the Court—Upton, J.

(1 Chitty's Pl. 109, 110, 111; Civ. Code, §§ 5, 143, 145; 20 John. 342; 9 Cow. 26; 3 Blk. Com. 159, 420.)

The Code has not abolished common law causes of action. (9 Barb. 268; 5 John. 175; 13 Id. 322; 15 Id. 220; 6 How. Pr. 229; 19 Barb. 560; 27 Id. 310; 7 Abbott's Pr. 129.)

It has always been regarded in all the States a just foundation for an action. (17 Wend. 329; 1 Hill, 645; 5 Id. 408; 29 Barb. 295.)

Without this action the plaintiff has no remedy. (Civ. Code, § 50.)

John Burnett, for Respondent.

When a judgment is obtained upon a demand, the right to maintain an action therefor is at an end. The manner of enforcing collection is then by execution and not by an action. (Civ. Code, §§ 209, 271.) The Code having provided the manner in which judgments, foreign and domestic, can be enforced, that course must be pursued. The Statute of Limitations and the statute for enforcing the judgments of sister States, exclude the idea of enforcing a domestic judgment by action. (Civ. Code, §§ 5, 728.) The manner of enforcing its domestic judgments is provided by each State. (13 Peters, 312.) The manner in which a judgment rendered in Justice's Court may be enforced is provided by statute. (Civ. Code, §§ 50, 51.)

Since the disuse of real actions, actions for debt, upon judgments, have been discountenanced by the Courts as vexatious and oppressive. (Blackstone Com. (Chitty's Ed.) 118, 159.) A practice at the common law not adopted by the Courts of the State will not be recognized. (*Commonwealth v. Roby*, 12 Pick. 513.)

A judgment in this State is effected for the purpose of supporting an execution within five years from its rendition, and as a lien upon real estate for ten years therefrom. (*Murch v. Moore*, 2 Ogn. 190.)

By the Court, UPTON, J.:

The matters discussed on the argument may be resolved into these questions:

Opinion of the Court—Upton, J.

First. Does an action lie, as a matter of course, upon a judgment rendered in this State as soon as the judgment is rendered?

Second. Do the particular circumstances disclosed by the transcript in the case justify the plaintiff in suing upon the judgment?

The respondent claims that the statutory mode of applying for leave to issue execution, and the provisions in relation to filing transcripts and docketing judgments, are intended as a substitute for all other proceedings in the nature of *scire facias* and for all actions upon domestic judgments. The appellant claims that a judgment creditor has a common law right to sue upon his judgment as soon as it is rendered, and it is expressly stated in two of the New York cases, cited by the appellant, that it is a common law right to sue upon a judgment as soon as the judgment is recovered. (*Hale v. Angel*, 20 John. 342; *Smith v. Mumford*, 9 Cow. 26.) The appellant also claims as a general rule that creating a new remedy for the redress of a private injury does not by implication abolish or take away any existing right of action; and this must be admitted to be the general rule.

If the language used in pronouncing upon the two cases above cited is to be taken without any qualification and received as sound law, and if it is to be deemed expressive of what is sometimes denominated American common law, that is, the general rule of action now in force in this country, except where it is modified by statute, the appellant's conclusion seems a logical and necessary deduction. What is claimed by the appellant amounts to this: That although the Legislature may have intended to provide a statutory mode of enforcing judgment sufficient to meet every contingency that may arise, yet the Legislature has not interdicted the common law right of action if such right existed. It therefore becomes necessary to determine whether the appellant really has the common law right which he claims, and whether the language of those cases correctly declares the common law.

The reports of those cases are not very full, but they in-

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dicate that counsel did not at all, in either case, discuss the question whether at common law the action lies as a matter of course as soon as the judgment is rendered ; and it is impossible to determine from the reports of those cases how much consideration was given by the Court to the point, whether at common law the bare existence of the unsatisfied judgment was a sufficient ground for an action, or to say whether debt upon the judgment was there sustained as a matter of course upon grounds or reasons that still exist. An examination of later decisions in that State and of the rulings in other States, leads to the belief that the Court would not have held, upon full investigation, that a plaintiff could maintain debt upon a judgment in a case where he could have the full effect and benefit of his judgment without such action.

It is true that from very ancient times the action of debt on judgment has been recognized as proper, but like every other proceeding at common law, the action was based upon some sufficient reason arising out of the nature or necessities of the case. If it would be a proper construction of the language used in the cases of *Hale v. Angel* and *Smith v. Mumford* to treat those cases as holding that the common law sustained the action without any other reason or necessity, and solely to enable the creditor to coerce or intimidate the debtor by threatening him with accumulation of costs, it is believed that that position is not sustained by any other case to which our attention has been called.

The cases of *Ames v. Hoy* (12 Cal. 11), and *Stuart v. Lander* (16 Cal. 374), each declare that the action would lie at common law, and that it is maintainable even though an execution might issue to enforce the judgment. Each of these opinions contains language capable of construction quite as favorable to the appellant as that of the case above cited. But in the first case the report shows that the record-book containing the judgment had been destroyed by fire, and in the second case that "the time in which an execution could be issued had expired, and that there was no means of enforcing the judgment except by action." If the records in the two cases first above-mentioned could be in-

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spected, it is possible similar reasons might be disclosed; and if so, the cases would be classified with those where the action is grounded upon special reasons arising out of the necessity of the case, and would not support the applicant's first position.

In most of the subsequent cases arising in the State of New York in which the subject of suing upon judgment is discussed, either the discussion relates to foreign judgments, or the disputed right involves the construction of a statute, or the right to sue is based on a ground of some necessity or of some substantial advantage to the creditor. After an examination of many cases from the same State, we do not find the idea reiterated that at common law an action would lie where no necessity exists, if in fact it ought to be considered as affirmed in these cases. On the contrary, in most of the subsequent cases cited from the State of New York, the proceeding is either based upon a statute, or some special reason appears why the plaintiff cannot otherwise have the full effect of his judgment. In some cases, the plaintiff being an executor, is compelled by statute to sue in order to have the benefit of the former judgment; in others, the new complaint is in the nature of a creditor's bill; in others, it was necessary to try some issue in regard to the validity of the original judgment. (*Cameron v. Fowler*, 5 Hill, 306; *Burwell v. Jackson*, 5 Seld. 535; *Dobson v. Pearce*, 2 Kern. 156.)

This class of actions had frequently been the subject of legislation in that State prior to 1851; at which time it was provided by statute that leave should be obtained from the Court before bringing an action upon a judgment between the same parties. In regard to that provision, Justice Roosevelt remarked in *Burrough v. Hull*, "It was enacted 'to prevent the evil of accumulating costs by piling judgment upon judgment.'" And he adds: "The ordinary and, in ninety-nine cases out of a hundred, the proper mode of collecting a debt which is already in judgment is by issuing an execution." When, however, circumstances have occurred since the judgment was rendered, such, for

example, as a discharge in bankruptcy, or a release by act of the creditor, or a constructive payment, about the truth or effect of which circumstances a dispute exists, a formal action to try the newly arisen issues would not only be proper, but some proceeding of the kind may be necessary.

For such reasons, actions upon judgments continue to be brought; and there is no doubt they have been permitted, from the earliest times of which we have knowledge, for other equally valid reasons. Our statutory proceedings in the nature of *scire facias* (Civ. Code, § 292) are proceedings in the nature of an action, which afford means of disposing of many, if not all, such newly arisen issues; and these proceedings have the advantage over an ordinary action of retaining the entire record in the same Court, and of preventing unnecessary cost and inconvenience to the defendants. Whether they are intended as a substitute for all other actions upon a domestic judgment, as is claimed by the respondent, it is not necessary now to attempt to decide. On the subject of the common law right to the action of debt on judgment, an opinion of Chief Baron Comyn is mentioned in *Clark v. Goodwin* (14 Mass. 228), in which the Chief Baron places the right to bring debt upon judgment, on the ground that at common law the plaintiff had no other mode of recovering interest on his judgment. He states that final process did not authorize the collection of interest accruing after the rendition of the judgment; and it seems to have been his opinion that the right at common law to sue upon a judgment depended upon the necessity of the case, and on the circumstance that full redress could not be obtained without resorting to the action. It is argued that, at common law, the plaintiff was not required to set forth in his complaint any such special grounds, and hence it is inferred that none need exist. But since the Court takes notice of the law governing its own process, the matters mentioned by the Chief Baron are such as need not be set forth in the pleading.

In South Carolina, the action being permitted upon a judgment where the original cause of action did not bear interest, it was said: "At common law no interest can be

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collected upon an execution under a judgment, but interest is recoverable in an action of debt on judgment." (*Pinckney v. Singleton*, 2 Hill, S. Car. 343; *Harrington v. Glen*, 1 Hill, S. Car. 79.) It would seem from these cases, as well as from the opinion of Baron Comyn, above referred to, that the common law permitted the suing over a judgment whenever that was necessary to afford the plaintiff a means of having the full effect of his judgment, and not otherwise.

If the common law permitted debt upon judgment solely to enable the plaintiff to obtain interest upon his judgment, that reason for the practice would be inapplicable in a State where every judgment bears interest collectible by execution, and where interest can be obtained equally well without an action. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

It was held in Connecticut, that "an action of debt on a judgment will not lie unless it appears that the plaintiff cannot otherwise have the effect of his judgment." (*Wells v. Dexter*, 1 Roote, 253.) And in Alabama it is a good defense to such action to show that execution is still available on the former judgment. (*While v. Hadnot*, 1 Port. 419.)

A similar opinion was expressed in *Lee v. Giles* (1 Bailey, 449).

The Court is of opinion that the plaintiff cannot claim a strict right to sue his judgment as often as he may choose without showing any necessity for such course. And if, in coming to this conclusion, it is necessary to disregard the positions stated in the cases of *Hale v. Angel*, and *Smith v. Mumford*, I should feel less hesitation in doing so for the reason already expressed in regard to those cases, and because of the peculiar position the question has occupied in that State as compared with other States. We conclude, from all the authorities presented, that neither the common law nor the practice in the various States of the Republic, nor anything inherent in the subject, based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

In considering the peculiar circumstances of this case as applicable to the second question, it must be observed that by the statute (Civ. Code, § 50) the plaintiff had one year in which he might file a transcript with the Clerk, and thus make the judgment a lien upon real estate, which time expired without such filing before this action was commenced. And by § 60 of the same Act, the plaintiff still has the right to file a transcript with a Justice of the Peace of any other county, which filing will authorize the Justice to issue execution and to enforce the judgment by levy upon personal property. It seems to be understood, however, that any execution that can now issue, whether from the Court where the judgment was rendered or from one in which a transcript shall be filed, will only authorize a sale of personal property. It, therefore, may be a positive advantage and even a necessity to the plaintiff to have this action. Possibly the plaintiff may never be able otherwise to have the full benefit of his judgment because the defendant may remain destitute of personal property. Had the plaintiff shown a sufficient reason for not filing his transcript with the County Clerk, I confess I am unable to see how he could be denied this action. And I come to the decision of this branch of the case with hesitation, and with the impression that if the case had been submitted to me at *nisi prius*, as it was to the County Judge of Benton County, as a new and undecided question in this State, and one that perhaps was, under the circumstances, *sub modo*, addressed to the discretion of the Court, I am no way confident that I should have held it incumbent on the plaintiff to set forth facts in excuse of his want of diligence, or to justify his failure to file a transcript within the year. But there are many reasons in favor of the view that seems to have been taken by the County Judge. The case disclosed a want of diligence on the part of the plaintiff, from which had resulted whatever of disability he now seeks to avoid, and the facts stated do not show him entirely without remedy, nor present any excuse for the delay.

The County Judge violated no rule or precedent established in this State in ruling that the facts set forth in the

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complaint did not lay a foundation for an action upon the judgment, and I am not prepared to say that the County Court committed an error, or to hold that the Circuit Court erred in sustaining the ruling.

It is the opinion of this Court that the judgment of the Circuit Court should be affirmed.

B. F. BROWN, APPELLANT, v. L. FLEISCHNER, STATE TREASURER, RESPONDENT.

AUTHORITY OF THE SECRETARY OF STATE IN AUDITING CLAIMS AND DRAWING WARRANTS.—The authority of the Secretary of State to audit accounts and draw warrants upon the Treasurer, depends upon the condition that an appropriation has been made by the Legislature for their payment.

STATE TREASURER—WHAT WARRANTS MAY BE PAID BY.—The State Treasurer is presumed to know what appropriations have been made, and he has no right to pay warrants unless drawn upon some specified fund, except when a claim is authorized by law to be paid out of a general contingent appropriation, he may pay the same upon the warrant of the Secretary.

Per Upton, J., dissenting:

LEGISLATIVE POWER, DELEGATION OF.—The Legislature cannot delegate the power to legislate, unless it be in the specified exceptional case of creating municipal corporations.

STATUTE, AMENDMENT OF—APPROPRIATION ACT.—Provisions in a General Appropriation Act cannot operate to transfer the power of auditing claims from one officer to another. Nor can the statute that provides the mode of auditing public accounts be revised and amended by a joint resolution, or by provisos in a General Appropriation Act.

FUND.—Every law that imposes or authorizes a tax must create a fund, unless a fund already exists, into which the tax is to be paid.

IDEM.—When a statute provides that the State shall pay for particular services, if there is no special requirement that the claim shall be paid out of a particular or special fund, it will be payable out of the general fund.

AUDITING PUBLIC ACCOUNTS.—The provisions of § 6, p. 622, of the Compiled Laws, requiring the Secretary of State "to examine and determine the claims of all persons against the State, in cases where provisions for the payment thereof shall have been made by law," limits the action of the Secretary to cases where the law provides or enacts that the claimant is entitled to be paid by the State, and not to times when payment can be instantly made.

DUTY OF THE SECRETARY OF STATE.—It is the duty of the Secretary of State to audit public accounts in every case where the law has clearly provided that the claimant shall be paid by the State; and if the claim is allowed, to draw his warrant for the amount found due.

Argument for Appellant.

APPEAL from Marion County.

In §§ 5, 7, 8, 10 and 12 of the General Appropriation Bill passed by the Legislature in 1870, provisions were made for the redemption of warrants drawn on the penitentiary, incidental, executive and general funds, with a proviso in each case that said warrants should not be paid until after the same had been audited by an investigating commission, *provided* such commission was appointed. At the same session the Legislature adopted a joint resolution creating such a commission.

Appellant petitioned for a mandamus to compel the payment of certain warrants drawn by the Secretary of State on the penitentiary and incidental fund for the payment of claims which had been disallowed by the investigating commission. These warrants had been drawn prior to the Act of 1870, to cover expenditures which the Legislature of 1868, failing to pass an appropriation bill, had not provided for.

The other facts are stated in the opinion of the Court.

Knight & Lord, for Appellant.

The provisos contained in §§ 5, 7, 8, 10 and 12 of the Act of 1870, are unconstitutional and void. In contemplation of law no such investigating commission as is referred to in those sections has been created. The Constitution has made the Secretary of State auditor by virtue of his office (Constitution, Art. 6, § 2), and in pursuance thereof the Legislature has defined his duties. (Mis. Laws, ch. 1, §§ 15-20.) The Legislature has no power to delegate any duty or authority which the Constitution has imposed on the Secretary of State, to any other officer, board, commission or tribunal. (10 Wisc. R. 525.)

The joint resolution creating the investigating commission creates an office. (2 Bouv. Law Dict. 239; 8 Cal. 41.) The Legislature has no power to enact a law the taking effect of which is made to depend on any condition or other authority not provided in the Constitution. (Constitution, Art. 1, § 21; 4 Selden, 483; 2 Iowa, 205.) Laws making

appropriations for the salaries of public officers and other current expenses of the State, shall not contain provisions on any other subject. (Constitution, Art. 9, § 7.) Every act must embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But only so much of any act shall be void as relates to subjects not embraced in the title. (Constitution, Art. 5, § 20; 14 Louis. R. 9; 32 Ill. R. 181; 11 Ind. R. 199; 4 Metcalf (Ky.) R. 72.) If the void part of a statute can be stricken out and the valid portion will be operative, the former should be rejected and the latter allowed to stand. (1 Gray, 21; 5 Gray, 100; 4 Metcalf, 288; 24 Pick. 361; 3 Nevada, 180.) It is the imperative duty of the Secretary of State to draw his warrant when claims of the character embraced in the warrants in question are presented duly credited and certified. (Mis. Laws, ch. 44, § 14; Id. ch. 1, §§ 15, 21.) The Treasurer has no power to audit and settle claims against the State and cannot refuse to pay a warrant drawn on him, in legal form, if there are funds in the Treasury appropriated by law for the purposes specified in the warrant. (Mis. Laws, ch. 1, § 28; 2 Metcalf (Ky.) R. 106; 14 Louis. R. 225.)

G. W. Lawson and C. G. Curl, for Respondent.

The State Treasurer cannot pay without an appropriation first made by the Legislature, and the Legislature may appropriate or not in its discretion. (Constitution, Art. 9, §§ 2, 4, 7; 1 Ogn. 213.)

The Secretary of State has no right to audit claims against the State, except in cases where provision for their payment has been made by law. (Mis. Laws, ch. 1, § 15.) The warrants in question were drawn prior to the Act of 1870, and before any attempt had been made to appropriate money for their payment. They were therefore void.

By the Court, THAYER, J.:

This was a proceeding by petition for a writ of mandamus against the State Treasurer, L. Fleischner, to compel the payment of five certain State warrants, drawn in 1869 and

1870 by Samuel E. May, late Secretary of State, upon said Treasurer, who refused payment thereof.

The application for the writ was argued at Chambers before the Judge of the Third Judicial District, Hon. R. P. Boise, and the writ dismissed, from which order the petitioner appeals to this Court.

Many points were discussed in the argument of this case, by the counsel for both parties, which this Court does not deem it necessary to decide.

It seems from the proceedings herein, that the Legislature which convened in 1868, failed to make appropriations to defray the expenses of the State for the ensuing two years, as required by law.

The only question which this Court has considered it necessary to determine is, whether the State Treasurer was bound to pay warrants drawn upon him by the Secretary of State, when no appropriations have been made by the Legislature for their payment.

Section 2, of Article IX, of the Constitution of this State reads as follows: "The Legislative Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year, and also a sufficient sum to pay the interest on the State debt, if there be any." Section 4, same Article, provides, that "no money shall be drawn from the Treasury, but in pursuance of appropriations made by law." Section 7, ditto, provides, "that laws making appropriations for the salaries of public officers and other current expenses of the State, shall contain provisions upon no other subject." The statute, page 621, § 15, subdivision 7 (Mis. Laws, ch. 1, § 15), provides, that among other duties of the Treasurer, "he shall examine and determine the claims of all persons against the State, in cases *where provisions for the payment thereof shall have been made by law*, and to indorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant upon the Treasury for the same," etc.

The Secretary of State, like every other officer of the State government, possesses no substantive powers, except

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such as are enumerated in the Constitution and statute. The provisions of law referred to define and limit his duties, and he can only exercise those duties upon the terms and conditions specified in those provisions. His authority to audit accounts and draw warrants upon the Treasurer, depends upon the condition that an appropriation has been made by the Legislative Assembly for their payment.

The State Treasurer, like the Secretary, has only limited duties and functions, which he has no right to transcend. He is presumed to know what appropriations have been made by the Legislature, and has no right to pay warrants, unless drawn upon some specified fund, except when a claim or amount is authorized by law to be paid out of a general contingent appropriation, which he may pay upon warrant of the Secretary. (Mis. Laws, ch. 1, § 28.)

These guards and checks upon transactions of public officers were wisely made, and each officer should be required to keep within the scope of his authority, not only in order to secure the interest of the public, but also to protect the rights of the individual citizen. As there were no appropriations made for the payment of the warrants in question, the Secretary of State had no right to draw the same, and the State Treasurer violated no official duty in refusing to pay them.

. The decision of the Court below is, therefore, affirmed.

UPTON, J., dissenting:

This case involves the question whether the Secretary of State has authority to audit public accounts at times when all the money which may have been appropriated to the payment of the particular class of accounts that may be presented, has been paid out upon claims of the same class. Some incidental questions of minor importance arise in the case, and it will avoid complication to refer to them before entering upon the principal and very important question relative to the duties of the Secretary of State. The incidental questions relate to the powers and duties of a commission or legislative committee, appointed in pursuance of a joint resolution passed October 25, 1870.

The Constitution uses the following language in regard to the Secretary of State (§ 2, Art. 6): "He shall be, by virtue of his office, auditor of public accounts, and shall perform such other duties as shall be assigned him by law." By the act of 1859 (Mis. Laws, ch. 1, § 15), it is made his duty "to examine and determine all claims of all persons against the State in cases where provision for the payment thereof shall have been made by law, and to indorse upon the same the amount due and allowed thereon and from what fund the same is to be paid, and draw a warrant upon the treasury for the same."

There are some provisions of statute that appear at first glance to be an attempt to transfer the power to audit public accounts from the Secretary of State; as, for instance, that which directs the Superintendent of the Penitentiary to certify to certain accounts; but in reality they amount only to this: that the certificate shall be sufficient evidence to authorize the Secretary to approve the account and draw his warrant. I think these provisions have never been treated as having greater force, and up to the passage of the joint resolution above mentioned, I am not aware that any question has been raised against the power of the Secretary of State to act as auditor of public accounts.

Prior to the session of the Legislature of 1870, the Secretary of State had audited claims and drawn warrants which were unpaid at the time of the passage of the joint resolution in question, among which were the warrants in controversy; and it has been assumed in the course of the argument that the commission appointed in pursuance of the joint resolution was clothed with power to review the action of the Secretary of State, and to annul or approve the warrants previously drawn by that officer; and the power has been claimed for the commission, to annul such part of each warrant as their discretion should dictate. Whether the Legislature could confer such power on a commission or committee thus appointed, is one point discussed; another point is, whether the language of the joint resolution imports an intent to confer such power.

The joint resolution directs "that a committee com-

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posed of two persons, one to be chosen by each House, be constituted a commission. Said commission shall have power to select an additional commissioner, who shall be governed by the same rules and receive the same compensation as the other commissioners." The compensation is fixed at five dollars per day. This commission is directed to inquire into various specified matters. Their duties, so far as they relate to any subject connected with the warrants in question, are declared in the following language: "It shall be the duty of said commission, after it is organized, to proceed at once to investigate the official conduct of the State officers for the last four years in the following order: First, Superintendent of the Penitentiary; second, Treasurer; third, Secretary of State; fourth, Governor; and fifth, Commissioners of School Lands; to examine the books of each department, compare all entries therein with the vouchers on file; to examine all original bills by items, comparing them with the vouchers, and attest the same to the Treasurer, if correct, and the Treasurer is required to pay the warrants so certified upon presentation."

That part of the resolution that treats of the general powers of the committee provides, that "said commission shall have power to appoint a competent clerk to issue subpoenas, administer oaths, compel the attendance of witnesses and to send for persons and papers. They shall keep a correct record of the testimony taken before them and report the same, properly attested, at the next session of the Legislative Assembly."

The leading object here contemplated is evidently a committee or commission to investigate facts and report for the information of the Legislature; and I am unable to find, in the language employed, authority in the Commission, either to assume the duties of the Secretary of State in auditing accounts, or to render final decisions as a tribunal to review his action.

It may be a reasonable inference from the language of the resolution, that it was then expected some Act would be passed prohibiting the Treasurer from paying the warrants then outstanding, and perhaps amending the statutes that

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relate to the duties of the Secretary of State and of the State Treasurer. But nothing in the resolution purports to amend those statutes or to prohibit the Treasurer from paying warrants; nor does it require holders of warrants to surrender or present them. If *bills* were found *correct* the committee was directed to *attest* them; but as to bills that they should consider incorrect or doubtful, or correct in part and incorrect in part, they have no authority to attest or certify or take any action except to report their proceedings with the evidence to the Legislature. I infer from this language that the object of causing bills which the Commission deemed correct to be "attested," was to indicate those in regard to which there was in their opinion no necessity of reporting to the Legislature and no necessity for legislative action.

If the matter could be divested of all question as to the power of amending laws or making laws by joint resolution, and of all question as to the constitutionality of what is contended for, the language of the resolution, of itself, is not sufficient to direct the Commission to undertake to make a final decision in regard to bills that they do not deem correct, or to do more in regard to them than to investigate and report. This view corresponds with the whole tenor of the resolution, the general object of which is an investigation and information to be laid before the Legislature. If we add to this the consideration that the Legislature must be presumed to know that the statutes prescribing the duties of the Secretary and Treasurer were still in force, and that they could not be amended by a joint resolution, the conclusion is irresistible that the Legislature never contemplated conferring power to make final decisions by the joint resolution alone.

These are not the only difficulties in the way of claiming such power for the Commission. An attempt to show that this was something more than a legislative committee of investigation, and to show that, in addition to its duty to investigate and report for the information of the Legislature, it had power to make final decisions, whether in the capacity of public auditors or as a judicial board for review-

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ing the decisions of the Secretary of State, or as a representative of the Legislature to determine these matters by virtue of delegated legislative power, will meet with very serious obstacles. The following are some of the difficulties that stand in the way of the assumption:

The Legislature cannot delegate the power to legislate unless it be in the specified exceptional case of creating municipal corporations. It is a maxim of the law that a delegate cannot delegate his powers.

By § 30, Art. IV of the Constitution, no Senator or Representative shall be appointed to any civil office of profit that shall have been created during his term.

Such a Board, in making final decisions, must act within one of the four governmental departments: the legislative, executive, administrative or judicial; "and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." (Section 1, Art. 3.)

The Constitution vests the power of auditing public accounts in the Secretary of State.

Section 1, Art. VII, of the Constitution, vests the judicial power of the State in the particular tribunals there specified, and such a commission cannot be clothed with judicial power.

The mode of auditing accounts was already prescribed by statute, and it could not be changed, except by amending or repealing the law. Laws cannot be amended by joint resolution, but the act or section amended must be set forth at length.

Whether the power of such Commission to decide the matter in question be claimed as exercised within the legislative, the administrative or the judicial department of the government, the difficulty is equally great. If it is conceded that the Legislature may, as a legislative act, pass upon all claims against the State, it is certain that a legislative act requires a quorum of each House, and the power to act in a legislative capacity cannot be thus delegated. If the Commissioners are appointed not to legislate, but merely to audit claims, their acts would be within the administra-

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tive department; their function would be one which the Constitution has vested in the Secretary of State, and they, while members of the Legislature, would be holding an office of profit created by the Legislature of which two of them are members. If their action is a mere review of the decisions of the Secretary of State with power to affirm or reverse, they must either act by virtue of delegated legislative authority, or their action is an attempted exercise of a part of the judicial power of the State.

It is plausibly said the Legislature has power to appoint committees of inquiry to act during the recess, or while the Legislature is not in session, and hence had a right to appoint this Commission, and that the Commissioners were still members of the Legislature, and consequently not appointed to any office of profit created by the same Legislature of which two of them were members; that the Commission was authorized to perform certain duties which it was not convenient for the Legislature to perform in session, and that "this kind of legislation is not new."

The sophistry of this statement lies in the circumstance that it ignores the main point claimed by its author, and the main point which it seeks to establish; it ignores the question whether the Commission has power to make decisions that shall be *final* without being reported to and acted upon by the Legislature. With this point added, it cannot be said that this kind of legislation is not new. It is claimed in the same connection and as part of the same argument, that this Commission exercises "powers that are in their nature judicial," and that their decision concerning the warrants is "a final judgment so far as any provision now exists for their redemption." The bare statement of this position is sufficient to show that the power claimed for the Commission is something more than can pertain to a mere legislative Committee, and that, if such be their powers, they are officers filling an office created by the Legislature of which two of them are members.

The position that the Commissioners had power to make final decisions and yet held no office other than that of members of the Legislature, and the statement made in the same

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argument, that the constitutional limit of pay to members of the Legislature only applies during the time of the session, and that at other times members may receive five dollars per day, seem to rest on very similar bases; but I have not been able to appreciate the strength of either position, and I must proceed upon the conviction that if the Commissioners were thus empowered they held an office other than that of members of the Legislature.

To the point touching the ability of members to fill the office, if it be an office of profit, it is replied on the part of the respondent that even a constitutional disqualification of members will not render the acts of the Commission void, and that the point is therefore immaterial.

Whether or not the acts of the Commission would be void in the case supposed, the fact that members of the Legislature were appointed by the authors of the resolution is a material and a very strong circumstance against the inference that the framers of the resolution intended to charge the Commission with duties which members of the Legislature were prohibited from performing; and such considerations are especially applicable to a case like this, where the power to audit claims or make final decisions is not conferred by express words, but sought to be raised by implication. In construing the resolution, we have no right to assume that its authors were ignorant of the law, or that they intended to violate the Constitution.

It cannot be supposed that the Legislature intended, by the indefinite language employed in this resolution, to direct the Commission to take all the bills from their proper custodian and pass them over to the custody of the State Treasurer, thus destroying the system of checks and balances and the means of verifying the accounts between the Secretary and Treasurer. Yet the only certificate they were empowered to make is an attestation of the bills deemed correct; and the power to make that attestation is the only power the resolution purports to confer upon them, even by implication, except the power to investigate and report to the Legislature. The Committee was not empowered to draw warrants or in any manner to give the Treasurer official

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notice or information in regard to bills that were deemed incorrect or doubtful.

It is also indicated in provisos contained in the Appropriation Act, passed three days later than the resolution, that the Legislature did not consider the duties of the Treasurer modified or changed by the joint resolution; but the resolution derives no force or vitality from the provisos contained in the Appropriation Act, because the Constitution, Article IX, Section 7, provides that "laws making appropriations for the salaries of the public officers, and other current expenses of the State, shall contain provisions on no other subject." It cannot reasonably be contended, in the face of that direct and unequivocal provision, that the General Appropriation Act can operate to transfer the power of auditing claims from one officer to another; or that it can contain valid provisions in regard to what persons shall act as "auditor of public accounts," when that matter is already settled by the Constitution.

Section 10 of the Appropriation Act, just mentioned, is as follows: "For the redemption of warrants drawn on the General Fund, \$8500; *provided*, that nothing in this section shall be so construed as to apply to the payment of said warrants until the same have been audited by the investigating commission; *provided* said commission is appointed." And the other sections, making appropriations, are accompanied by similar provisos. It is conceded, in this case, that the Appropriation Act has taken effect, the point controverted in relation to it being whether the provisos are operative, or whether they are surplusage. And I think it may be taken, as conceded in the argument, that unless the commission had power to decide upon the validity of these warrants, the appropriation covers them. At least that is the law, if the Act has become operative. It needs no argument to show that the statute that prescribes the mode of auditing public accounts cannot be revised and amended by a joint resolution, or by provisos in a General Appropriation Act. The statutes defining the duties of the Secretary of State, and of the Treasurer, have not been amended in any manner known to the Constitution. The

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effect and authority of the warrants remained the same after the passage of the joint resolution as before, and the duties of the Treasurer remained the same.

In my opinion the commission had no power to make a final decision upon the claims in question, and the case must turn wholly upon the point whether the Secretary of State had power to audit the accounts at the time the warrants were drawn. The decision of this point depends upon the construction of the provision of statute first above quoted. It is contended on behalf of the respondent that the words of that section which limit the action of the Secretary of State to "cases where provisions for the payment thereof shall have been made by law," should be construed to limit the Secretary's action to *times* when there are unexpended appropriations; or, in other words, that the language employed indicates an intention to limit the times when, or the circumstances under which, he may proceed, rather than the *cases* in which he shall audit public accounts.

In discussing this question, much stress is laid on the provision of the same section which requires the Secretary to indorse on the claim, "from what fund the same is to be paid." It is assumed that when the money specified in an appropriation act is exhausted *a fund is annihilated*; and from this assumption it is argued that from the time of exhausting the appropriated money "it was impossible for him [the Secretary] to indorse on a claim the fund out of which it was to be paid," it being claimed that, "when the appropriation was exhausted, no such fund existed, and the only way in which a fund can be created is by an appropriation by the Legislature." The argument is founded upon an evident inadvertency in applying or defining the words "fund" and "appropriation," by which the words are treated as convertible terms or their signification is confounded. The whole of this branch of the argument is based on the erroneous assumption that a fund can be created only by an appropriation act.

The Constitution and our statutes relating to finance, use the word "fund" in its ordinary acceptance, and a brief examination will show that the word is employed to denote

something other than an appropriation, and that every law that imposes or authorizes a tax must create a fund, unless a fund already exists, into which the tax is to be paid. Funds are frequently created by law for particular purposes, such as the payment of interest on loans, or for the payment of a particular class of expenses; and a fund may be thus created in advance of the time when any of the money is appropriated by an appropriation act. Sec. 2, of Art. VIII of the Constitution, created a fund called the Common School Fund. By § 58 Mis. Laws, ch. 57, the Legislature created a fund consisting of five mills annually on the dollar, of the taxable property in the State, which is usually denominated "The General Fund." But by the Act creating this fund, the Legislature did not make an appropriation; it simply created a fund to meet the current expenses of the State, and provided a mode of collecting the money into the State treasury. These details of mode could not have been provided by an appropriation act, for those Acts can contain provisions on no other subject but that of the appropriation.

The Legislature from time to time creates special or particular funds, but after they are created the Treasurer cannot lawfully pay out any money from a special fund, nor can he pay out money from the general fund, until an Act is passed appropriating the money.

The difference in the meaning of the two words "fund" and "appropriation" is broad and distinct, both in their ordinary acceptance and in the manner in which they are employed in the Constitution and statutes of the State. And unquestionably a fund may exist before any of the money pertaining to it is appropriated and after an appropriation is exhausted.

By Art. IX, § 3, of the Constitution, "Every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." Every such law creates a fund or raises money for a fund already created.

Section 111 (Mis. Laws, ch. 57) provides that "whenever any moneys shall have been collected or received by any officer for any distinct and specified object, no portion of

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them shall be paid or applied to any other object or purpose without due authority, but it shall be kept a *separate fund* for such specific object."

From these, and similar enactments, it is clear that a fund must exist in every case where a tax is levied, and every collector and custodian of public money is presumed to know that such is the law, and is liable to criminal prosecution if he diverts any money from the fund to which it belongs, or fails to keep it in that fund.

In many cases, statutes that provide for paying for services are silent as to the fund out of which the claim is to be paid. When a statute provides that the State shall pay an officer or other person for particular services, or on account of property sold to the State, if there is no special requirement that the claim shall be paid out of a particular or special fund, it will be, I think, as a matter of course, payable out of the general fund created to defray the current expenses of the State. Section 28 of the same chapter that defines the duties of the Treasurer of State (Mis. Laws, ch. 1), provides that when any claim is "required to be paid out of a particular fund, it shall be paid out of such fund only." This is a very plain indication that a claim which is not required to be paid out of a particular fund is to be paid out of the general fund only.

The distinction between a fund and an appropriation has always been observed by prior Legislatures, and was not disregarded by the Legislature that passed the joint resolution in question. The statutes passed by the last Legislature recognize the existence of a general fund and of special funds in the absence of any appropriation. In treating of warrants drawn when there was no unexpended appropriation in existence, they appropriate money for warrants drawn on the general fund, on the penitentiary fund and on several other funds. They also appropriate money "out of the general fund" for certain purposes. No appropriation act was ever passed appropriating money *into* the general fund; and if the terms "fund" and "appropriation" are synonymous, or if the only way in which a fund can be created is by an appropriation, there has never been any

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money belonging to the general fund. It would be absurd to attempt to appropriate money *out of* the general fund if that fund is not created otherwise than by an appropriation act.

Unquestionably the existence of a fund does not depend upon whether or not the money pertaining to the fund has or has not been appropriated, and every lawful claim is either payable out of some particular fund or out of the general fund. When the law provides that a claim shall be paid and the claim is presented to the Secretary to be audited, it becomes the duty of the Secretary, if the claim is allowed, to determine out of what fund it is to be paid. If the law requires it to be paid out of a particular fund, he should indorse it accordingly, and if the law requires it to be paid, but does not require it to be paid out of a particular fund, it is to be paid out of the general fund, and it should be so indorsed.

The provision about indorsing warrants need not be further considered in construing the words, "in case where provisions for the payment thereof shall have been made by law." I think the most natural and obvious import of the words just quoted, is what the Legislature intended by this enactment; and that these words import an intention to confine the action of the Secretary to *cases* where payment has been sanctioned by law. I think the word "provisions" is here used, as it is generally used when speaking of legislation in the sense of "enactments;" and that the intent was to confine the Secretary to *cases* where the law provides or enacts that the claimant is entitled to be paid by the State and not to *times* when payment can be instantly made.

It is said this doctrine would invest the Secretary with legislative "power to control the disbursements of the public funds and pledge the public credit." The auditing of a public account neither controls the disbursement or pledges the credit or faith of the State. An account cannot be paid simply because it is audited, and the Secretary cannot audit an account unless the credit of the State is already pledged by some provision of law previously made, pledging the

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faith of the State that the claimant shall be paid. The Secretary's function is to decide whether the faith of the State has been so pledged by previous legislation, and if it has been pledged, to ascertain and certify to what extent. The claim certified by him is not to be paid solely because of his certificate or warrant, nor until the Legislature shall, in addition to such previous pledge, pass an act of appropriation in fulfillment of the pledge. If the Secretary commits a fraud or exceeds his jurisdiction, his action is as open to investigation before the judicial tribunals of the State as are those of a minor officer. He pledges nothing; he simply decides matters within his jurisdiction. It is the Constitution and the law-making power that pledges the faith of the State.

By § 6, Art. IX, of the Constitution, "Whenever the expenses of any fiscal year shall exceed the income, the Legislative Assembly shall provide for levying a tax for the ensuing fiscal year sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of the ensuing fiscal year."

From this carefully chosen language, we see that for the ensuing year an *estimate* may be relied upon; but the deficiency is to be *ascertained* and not merely estimated. The provision must be *sufficient* to pay the *deficiency* of the past in addition to the amount *estimated* for the future. Using the word "estimated" in the one case and omitting it in the other precludes any supposition that the levy is to meet only a mere estimated deficiency or an amount supposed to be sufficient to meet the deficiency. The Legislative Assembly is required to provide for levying a tax that is sufficient for the actual and not the estimated deficiency; and to do this it is evidently intended that they will know the amount of the deficiency. How is the amount to be known if he who alone is auditor of public accounts and who is made such by the Constitution, is prohibited from auditing?

This section of the Constitution answers a point raised by the defendant's counsel, that until the money is to be drawn from the Treasury there is no necessity of auditing claims. Drawing a warrant is incident to the auditing and

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is made so by statute. The manner in which the auditor enters or records his decisions is by indorsing the decision on the claim, and if the decision is favorable he does what is denominated "drawing" a warrant; but drawing a warrant is not a necessary part of the auditing except as it is made so by statute, and the decision would be just as effective if recorded in some other way. Drawing a warrant is not drawing money out of the Treasury, nor does it entitle the holder to receive money out of the Treasury, unless all the other requisites of the law concur with this act. The money must be collected and payment must be preceded by an act of appropriation. Drawing a warrant is part of the formal and convenient mode provided by statute for recording the auditor's decision, but the decision would be as effectual if the Legislature had provided some other mode of entering the decision. The substance of the transaction which, it is claimed, is prohibited, is the auditing of the accounts. If the Secretary is utterly prohibited from passing upon claims, it is difficult to know how the expenses could ever exceed the income or how a deficiency could ever arise. But even if we consider claims that are not even entitled to be audited to be "expenses," from which a deficiency may arise, it is certain that a rule that would prohibit the auditor of public accounts from acting upon such claims, would deprive the Legislature of the only mode known to the Constitution of ascertaining a deficiency.

I think too much importance is attached to the use of the word "provisions" in this connection. An attempt is made to construe the sentence as if that word pointed particularly to obtaining or appropriating money. The words "provision" and "provided" are employed frequently in speaking of statutory enactments of every kind, and on every subject, and the phrase "provisions made by law," when used to denote a statutory enactment, is no more subject to such limited meaning than the word "enactment," or any of the phrases used to denote the passage of a statute authorizing, permitting, directing, or requiring some particular thing to be done. It is not an unusual mode of expression to say, "provisions are made by law" for the

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times of holding Courts, for compelling the attendance of witnesses, for taxing costs, for changing the place of trial, for paying jurors, for the payment and satisfaction of judgment, when the collection, appropriation, obtaining or providing money is not alluded to by the statute or by the speaker, and when the only allusion to the subject of money is a provision as to the amount payable or the party entitled.

Another reason why the word "provisions" as used in this section ought not to be construed to point to the appropriation of money is, that the State is as well provided with money before the passage of the Appropriation Act as after. Such Act does not place a dollar in the treasury; it is merely the Treasurer's letter of authority for paying out money which is provided or obtained by virtue of some other law.

Section 28 of the Act under consideration assumes that the Secretary shall draw warrants in cases where money is not actually provided, in the strict sense of that word, and it directs that in such cases the Treasurer shall indorse the warrant, "not paid for want of funds."

What claims, then, are "in cases where provisions for the payment thereof shall have been made by law"? Provisions are made by law for paying a salary to District Attorneys, and no provision is made by law for paying a salary to a Sheriff. If money is placed in the general fund, or a salary fund, and a certain amount thereof is by an appropriation act appropriated to the payment of salaries of officers for the current year, the necessary money is provided; but, when the money is provided and appropriated, if both a District Attorney and a Sheriff should present claims for salaries, it would still be the Secretary's duty, notwithstanding the appropriation, to ascertain whether provisions had been made by law for paying the respective claims. He would find one to be a case "where provisions for the payment thereof" had been made by law, a law having provided what party was entitled and the amount to be paid. In the other case, no such provisions would be found.

A fund may be created, money may be collected and kept

in the fund, and an appropriation may be made from the money; but still the question will remain in each case that comes before the Secretary of State, whether the claim is made *in a case* where provisions have been made by law for the payment thereof. Collecting and appropriating money will not alone serve to bring any claim within the "cases where provisions for the payment thereof" have been made. Aside from, and in addition to, raising or providing money, some other provisions made by law must be found, or the Secretary has no right to allow the accounts; and I think it is obvious from the language employed, that the latter are the provisions referred to, and required by the statute in question. It is a matter of grave doubt whether the Constitution would permit legislation such as it is claimed resulted from this section.

The Constitution provides that certain officers, the Governor, for instance, shall receive a specified salary annually; that "the Legislative Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year;" and that the Secretary of State "shall be, by virtue of his office, auditor of public accounts." Here are provisions made by the fundamental law for the payment, annually, to that particular officer, a specified sum. To attempt to deprive the Secretary of State of the power to audit the claim, would seem much like an attempt to set aside the requirements of the Constitution. It cannot be said that such a claim is not *in a case* where provision is made by law for its payment.

If it is contended that the Legislature, in enacting the section under consideration, relative to the Secretary's duties, used the language above quoted, not to interpose a barrier against allowing claims in cases where there was no law directing that the party should be paid, or specifying the services for which payment should be made, but sought to remedy the evil of a possible failure to make appropriations for the current expenses, by depriving the Secretary of State of the power to audit public accounts, it would seem to be doing evil that good may ensue, and to be violating the fundamental law in order to preserve

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the State. This, it seems to me, would be assuming that one department of the government would or might violate the Constitution, and that the Legislature attempted to remedy the evil by compelling another department to violate it. When a definite and ascertained amount is due to a certain person, and the Constitution provides that the money shall be raised and the amount shall be paid within a specified time, I cannot conceive that it is a case where provisions for its payment are not made by law; nor can I conceive what power the Legislature has, under the Constitution, to prohibit the Secretary of State from auditing the account.

A statute must receive a construction consistent with its constitutionality, if its language will admit of such a construction. It seems to me clear that the construction contended for would conflict with the requirements of the Constitution, and I am fully convinced that it does not comport with the most obvious meaning, nor with the most reasonable construction of the language employed by the Legislature in defining the duties of the Secretary of State.

I am therefore compelled to dissent from so much of what I understand to be the opinion of a majority of the Court, as holds that the Secretary can audit public accounts only when there is an unexpended appropriation applicable to the payment of the particular claim presented. And I am of opinion that it is the duty of the Secretary of State to audit public accounts in every case where the law has clearly provided that the claimant shall be paid by the State; and if the claim is allowed, to draw his warrant for the amount due.

I think the warrants mentioned in the petition for mandamus were legally drawn, that the Legislature has passed no Act prohibiting the Treasurer from paying them, and that they are payable out of any money that may have been appropriated for the payment of the classes of expenses to which they respectively belong.

Statement of Facts.

WILLIAM CHAMBERS, APPELLANT, v. MARY ANN CHAMBERS, ELIZABETH MAURY, AND HER HUSBAND, R. F. MAURY, RESPONDENTS.

DESCENT OF LANDS UNDER THE DONATION ACT.—The restrictions upon the descent of lands granted under § 4 of the Act of Congress, relating to public lands in Oregon, approved September 27, 1850—commonly called the Donation Act—do not apply to lands granted under § 5 of the same Act.

IDEM.—Lands granted under § 5 of said Act descend in accordance with the provisions of the Statute of Descents, and of the common law.

APPEAL from Jackson County.

This suit was commenced in the Circuit Court for Jackson County, at its November term, 1870, to have the rights of the parties to Donation Land Claim 66 declared, and for assignment of dower and partition. The complaint alleges, that in the year 1852, Aaron Chambers, the father of the plaintiff, and Waity Ann Chambers, his wife, took up Donation Land Claim No. 66, in Jackson County, Oregon, and made proof of residence and cultivation, as required by the Donation Act of 1850, and the amendments thereto; that said donation claim was divided by the Register and Receiver at Roseburg, and the north half assigned to Waity Ann Chambers, and the south half to Aaron Chambers; that on July 20, 1859, Waity Ann Chambers died, leaving her surviving husband, and her son (by a former husband), John W. Manning, her only heirs at law; that on August 19, 1865, a patent for said donation claim issued to said Aaron and Waity Ann Chambers; that on September 13, 1869, said Aaron Chambers died intestate, seized and possessed of the south half of said donation claim, and the undivided half of the north half of said claim, and also seized in fee of the fractional southwest quarter of section 10, and fractional west half of section 15, township 37 south, range 2 west, and leaving the plaintiff, William Chambers, and defendant, Elizabeth Maury, his only children and heirs at law, and defendant, Mary Ann Chambers, his surviving widow; that after the death of Waity Ann Chambers, the defendant Mary Ann Chambers

Statement of Facts.

purchased the interest of John W. Manning in said donation claim, and by virtue of said purchase now claims the whole of the north half of said claim; that plaintiff is advised and believes that said Mary Ann Chambers is only entitled to one half of the north half of the said donation claim and to dower in the remainder of said land, and therefore prays that the rights of the several parties be declared and set apart, and that the dower of Mary Ann Chambers be set apart and assigned to her.

The answer of Mary Ann Chambers admits that Aaron Chambers and Waity Ann, his wife, took up said donation claim in 1852, under the fifth section of the Donation Act of 1850, and resided on said claim four consecutive years, and that the north half was assigned to Waity Ann Chambers as her half of said claim; that said Waity Ann Chambers died July 20, 1859, but denies that Aaron Chambers was her heir at law; that Aaron Chambers died September 13, 1869, in possession of said claim, but avers that his possession of the north half thereof was by right of curtesy, and not as owner. It avers that the said Waity Ann was the owner in her own right of the north half of the said claim at the date of her death, on July 20, 1859, by virtue of four years' residence and cultivation, under the fifth section of the Donation Act (dated September 27, 1850), and was entitled to a patent from the United States for the same, and that afterwards the patent issued, bearing date August 19, 1865, and granted to said Waity Ann Chambers and her heirs the north half of said claim; that John W. Manning was, at the time of her death, her only lineal descendant and sole heir at law, and as such inherited the said north half of said donation claim; that on August 12, 1869, by deed duly executed, he conveyed all his interest in said claim to defendant, Mary Ann Chambers, for the sum of \$2000; that she is justly entitled to said north half of said claim and to dower in the remainder thereof, for which she prays.

To this answer plaintiff interposed a demurrer, for the following reasons:

"1. The answer does not state facts sufficient to constitute any defense to this suit.

"2. It admits the land was acquired by residence, cultivation, notice and proof, according to the Act of Congress of September 27, 1850, and that the patent did not issue until after the death of the second wife of Aaron Chambers.

"3. The Donation Act gives the land in case of the death of either claimant before patent issues, to the survivor and children or heirs of the deceased, in equal proportions."

The Court overruled the demurrer and dismissed the suit, and from this judgment plaintiff, William Chambers, and defendants, Elizabeth Maury and R. F. Maury, appeal.

B. F. Dowell and E. B. Watson, for Appellant.

C. W. Kahler and J. F. Watson, for Respondents.

By the Court, McARTHUR, J.:

The only question pressed upon the attention of this Court was that in relation to the descent of the north half of the donation land claim described in the pleadings. The other question in relation to the partition and assignment of dower raised by the demurrer to the answer was not argued. It was admitted that John W. Manning was the only lineal descendant of Waity Ann Chambers, and that she was the owner of the land described in the grant, and that she obtained it under and by virtue of § 5 of the Donation Act, as the "Act of Congress, relating to public lands in Oregon," approved September 27, 1850, is commonly designated. Appellant's counsel urge that the restrictions placed upon the descent of lands acquired under and by virtue of § 4, which provides, among other things, that "when either shall have died before patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased, in equal proportions," apply with equal force to lands acquired under and by virtue of § 5 of said Act.

It will be noticed that the grants made in §§ 4 and 5 of the Act are separate and distinct grants of different quanti-

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ties of land to different classes and descriptions of persons. Also that the provision in § 4 changes the rule of descents from that of the common law and that of our statute, and that the conditions attached to a grant under § 5 are in many respects different from those to a grant under § 4. Though embraced in the same Act the two sections are entirely independent of each other so far as the restrictions upon descent are concerned. The provision in § 4 in relation to descents being in derogation of the common law should be strictly construed. It should not be extended in its operation over any property not expressly included in its terms. The words "and in all cases when such married persons have complied with the provisions of this Act so as to entitle them to the grant as above provided," which almost immediately precede the words "when either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions," clearly limit the restrictions upon the descent to the lands granted to settlers who have complied with the requirements as above provided, and they do not extend to the lands granted to settlers who comply with the requirements specified in subsequent sections. The language of that part of § 4 restricting the descent is clear, and in our opinion applies exclusively to lands granted under that section. Waity Ann Chambers held the north half of the Donation Claim under § 5, and as there are no restrictions placed upon the descent of lands acquired by virtue of said section, it follows that the provisions of the statute of descents and of the common law apply. In accordance therewith it descended upon her death to John W. Manning, her only lineal descendant, charged with the curtesy of Aaron Chambers, her husband, since deceased. Manning for a valuable consideration sold and conveyed it to Mary Ann Chambers, in whom the title now rests.

It follows from the above that in overruling the demurrer and dismissing the suit the Court below did not err.

Decree affirmed.

Statement of Facts.

STATE OF OREGON, RESPONDENT, v. N. R. PACKARD,
APPELLANT.

INDICTMENT.—Where the statute makes it a criminal offense “willfully and knowingly to charge, take or receive any fee or compensation, other than that authorized or permitted by law, for any official service or duty performed” by an officer, the indictment should show for what service or duty the charge was made or the money taken.

APPEAL from Wasco County.

The defendant was indicted under § 636 of the Criminal Code, which provides as follows: “If any officer of this State, or of any county, town, or other municipal or public corporation therein, * * * shall willfully and knowingly charge, take or receive any fee or compensation, other than that authorized or permitted by law, for any official service or duty performed by such officer, * * * such officer, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than one year, or by fine not less than fifty nor more than five hundred dollars, or by dismissal from office with or without either or any of such punishments.”

The offense is set forth in the indictment in the following language:

“Said Newton R. Packard, in the county of Wasco aforesaid, on the 4th day of January, A. D. 1870, being then and there an officer of said Wasco County, State of Oregon, to wit, the County Clerk of said county, duly elected and qualified to act as such, there and then acting as such clerk; and the said Newton R. Packard having then and there received the sum of four thousand two hundred and seventy and eighty-one one-hundredths dollars, as his full and lawful fees and compensation for official services, rendered by the said Newton R. Packard as such clerk, for said Wasco County, prior thereto; the said Newton R. Packard did, then and there, willfully, knowingly and feloniously, charge the said county of Wasco, for said official services performed by him as such officer, a compensation other than that authorized by law, to wit: The said Newton R. Pack-

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ard did, then and there, charge said Wasco County, and have the same allowed him by the County Court of said county, the sum of eight hundred and fifty-four and seventeen one-hundredths dollars, as an additional compensation for said service, rendered by said Newton R. Packard as such clerk, for said county, prior thereto, and for which the full compensation of four thousand two hundred and seventy and eighty-one one-hundredths dollars had been made by said county."

The defendant pleaded not guilty.

On the trial the State offered a record of the County Court, in the following words: "That N. R. Packard be allowed the difference between county warrants sold at eighty cents, on \$4270.81 received by him as County Clerk, the sum of \$854.17." The defendant objected, but the record was read in evidence, and the defendant excepted to the ruling.

The defendant was convicted and fined \$500. Before sentence he filed a motion in arrest of judgment, based upon the ground that the facts stated in the indictment do not constitute a crime. The motion was overruled, and defendant, having excepted to the ruling, appeals.

Orlando Humason, and Hill, Thayer & Williams, for Appellant.

In certain cases the County Court may allow to any officer or person performing service, additional compensation, when that prescribed is deemed inadequate for the service. (Mis. Laws, ch. 20, §§ 16, 22.) It does not appear that the services of defendant were not of this character.

Unless from the facts stated it affirmatively appear that the act done was unlawful it will be presumed to have been lawful. (Civ. Code, § 766.)

Defendant is entitled to be apprised of the particular official act for which the overcharge was made. (1 Wharton Crim. Law, § 285 and note *g*.) The indictment should state the legal fee allowed and the overcharge or extortion on the part of the officer. The offense could not be committed with reference to an official act or service for which

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the law had fixed no compensation, nor for an official act, known to the County Court, for which they might deem the compensation allowed by law inadequate and in their discretion allow additional compensation. (Whart. Prec. Ind. and Pleas, 909, note *m.*) The officer could not commit the crime without the act for which the charge was made was imposed upon him as an official duty. No act could be proven except the act alleged. No act is alleged in the indictment. He could not plead his present conviction in bar of another prosecution. (1 Pick. 171; 15 Mass. 525; 10 Mass. 211.)

The record of the County Court should not have been admitted in evidence. It shows that the amount received by defendant was allowed him to make up the difference between the face value of county scrip and the amount that had been realized on the sale of such scrip, and not as pay for any official service whatever. If the jury were allowed to consider this as in any manner proving the charge in the indictment, it may have misled them. (3 Cow. R. 612; 1 Comstock, 519; 3 Hill, 194.)

S. Ellsworth, for Respondent.

The indictment follows the statute *in ipsissimis verbis*, and nothing could have been added that would not have been mere evidence. (1 Ogn. 266; 2 Wheat. Crim. L. §§ 2514, 2516.)

The verdict is sufficient to support the judgment of conviction. (Crim. Code, § 179; 3 Wheat. Crim. L. § 3048.)

An alleged irregularity in the proceedings of the Circuit Court cannot be considered here, unless it is presented by affidavit supporting a motion for a new trial. (Civ. Code, §§ 235, 236.)

By the Court, UPTON, J.:

The case turns upon the sufficiency of the indictment. It is insisted on the part of the State that the offense is described in the language of the statute, and Wharton's Am. Cr. L. § 364, is cited to show that that mode of charging the acts that constitute the crime is sufficient. That author

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says: "It is a well-settled general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute;" and the position is undoubtedly correct as a general rule. The question whether the offense is described in the words of the statute, includes the question whether the acts constituting the crime are stated with "the circumstances that are necessary to constitute a complete crime." (Crim. Code, §§ 69, 72.)

An indictment cannot be said to describe the offense in the words of the statute, or in any words, unless it charges the acts which constitute the offense; and when an act is not criminal, unless done under particular circumstances referred to in the statute, the indictment does not follow the statute or describe the offense in the words of the statute unless it is direct and certain as to those particular circumstances mentioned in the statute.

In this case, it is an essential matter that the money willfully and knowingly charged, taken or received, be charged, taken or received for some "official service or duty performed by such officer," and that the fee or compensation be "other than that authorized or permitted by law" for that service. One of the particular circumstances mentioned in the statute as necessary to make such charging, taking or receiving money criminal is, that it must be taken for an official service or duty. Another is, that the money is other or more than is authorized or permitted by law for the official service or duty. To state that the defendant took money for official services, embraces the statement of a conclusion; and to state that the amount of money mentioned is more than is permitted by law for services without stating what the services were, is a statement of another conclusion. An issuable fact which is essential to be known in order to determine the correctness of either of these conclusions is, what were the services for which the money was charged, taken or received.

If the defendant wrongfully, willfully, knowingly, and even fraudulently and corruptly charged and received money

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from the county, it is not a violation of this particular section of the statute unless he charged or received it for an official service or duty. It is therefore necessary to show in the indictment what service or duty it was charged or received for, that the conclusion may be lawfully drawn whether or not it was for some official service or duty and whether or not it was excessive.

If the indictment states what the service or duty is for which the money was charged, the Court can take judicial notice of the law making that an official service or duty; and if the amount of compensation is fixed by law, the Court can take judicial notice what fee or compensation is authorized or permitted by law for that particular service. But if the service or duty is not designated in the indictment, there is not such a statement of "the acts constituting the crime" as will enable the Court to determine whether or not the money was charged or received for an official service or duty, or whether or not the fee or compensation charged and received was "other than that authorized or permitted by law." These are conclusions to be drawn from facts stated in the indictment, or in other words, from a statement of the acts constituting the offense.

The distinction becomes obvious in instances like the following: If a statute defines a crime by the words "assault another with intent to commit a felony," it would not be deemed safe to use in the indictment only those words, but the pleader would *give the name* of the person assaulted, and state *what crime* the defendant intended to commit. If the statute used the words "assault with intent to kill," the pleader would not omit the name of the person assaulted, nor fail to show against whom the intent was formed, although he could in one sense follow the language of the statute without giving the name of any person.

If a statute defines a crime by the words "assault with a dangerous weapon," it would be unsafe to make the charge in those words only, but the usual course is to add the name of the weapon, as with an axe, gun or sword; or if the assault be made with an instrument which the law does not adjudge to be a dangerous weapon, as a cane, to

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add, after charging that the assault was made with a cane, the averment that the cane was a dangerous weapon.

If the statute punishes the stealing of "any valuable thing, the personal property of an another," the pleader will designate the thing stolen, allege the value and name the owner, that the Court may be put in possession of facts upon which to predicate the conclusion that a valuable thing, the property of another, has been stolen.

Upon the same principle it was necessary in this case that the indictment should state what service was charged for the defendant. It is necessary for the pleader to designate the service that it may be determined whether it was an official service, and in order that it may be determined what fee or compensation was authorized or permitted by law for such service. The plea of not guilty puts in issue every material allegation of fact, and it is necessary that every material fact should be so pleaded that issue can thus be taken upon it. If the indictment states that the defendant performed certain services, not named, which were official services; that he charged a compensation therefor, other than that authorized or permitted by law, these allegations are not issuable facts, upon which the Court can predicate a judgment.

Upon a less strict theory of pleading, the indictment is bad. The pleader evidently intended to charge, in substance, that for all his official services, rendered during a certain term or period, the defendant was entitled to receive \$4270.81, and no more. That he did receive from the county that sum therefor, and that he afterward charged and received from the county an additional sum of \$854.17 for the same services. If this general mode of charging a crime could be sanctioned by the law, the indictment would still exhibit this defect, that it is not directly stated in the indictment that the sum of \$4270.81 is the only fee or compensation authorized and permitted by law for the services referred to. The indictment states that the defendant received that sum "as his lawful fees and compensation," and at the close of the stating-part it says that for those services

Points decided.

"the full compensation of \$4270.81 had been made him by the said county."

But this is not that directness and certainty of statement as to what compensation was permitted by law, required by §§ 69 and 72 of the Criminal Code. Nor is this mode of stating the acts constituting the crime sanctioned by any approved criminal law, to our knowledge. The indictment not only fails to state what the services were, but it does not directly state that \$4270.81 is all the compensation or the only compensation therefor authorized or permitted by law.

The defendant's counsel has referred to certain duties of the County Clerk for which the compensation is left to the discretion of the County Court, but that subject is not shown to be pertinent to the case made by the evidence.

The transcript does not bring the merits of the case before this Court, and what evidence is noted in the exceptions indicates an attempt to show that the defendant obtained from the county additional compensation or payment because county warrants which he had received were not par. However reprehensible such conduct may be when proven against a county officer, it is a matter with which this Court has nothing to do in passing upon the questions presented by the transcript. The point already discussed is decisive of the case as presented here, and the judgment should be reversed.

GEORGE W. HILLMAN, RESPONDENT, v. W. T. SHANNAHAN AND WILLIAM WADHAMS, APPELLANTS.

INDEMNITY BOND—WHEN NOT ASSIGNABLE.—Where the purchaser of a business takes a bond from the seller conditioned in a certain sum as liquidated damages that the seller will not engage in business of the character sold for a stated period, such bond can only be enforced for the protection and indemnity of the buyer alone, while carrying on the business in person, and will not be extended to his assignee. In such case, there is no right of action to assign until after a breach of the conditions of the covenant.

APPEAL from Multnomah County.

Argument for Appellants.

The facts are stated in the opinion of the Court.

Bronaugh & Catlin, for Appellants.

The bond was executed for the personal protection and indemnity of Tileston alone and there is no privity between appellant and respondent. (*Cal. Navigation Co. v. Wright*, 6 Cal. 258.) The absence of the words "heirs" or "assigns" in the bond, is evidence of a want of intention in the parties to make the bond assignable, and the law will construe the contract according to the intention of the parties. (*Dunlap v. Gregory*, 6 Seld. 241; *Moffit v. Coffin*, 3 Ogn. 426.) It has been held that the parties to a covenant of this kind cannot make such covenant assignable. (*Hurd v. Curtis*, 19 Pick. 459; *Webb v. Russel*, 3 T. R. 402.) If the lessee of *personal goods* covenants to deliver the goods or such price for them, this covenant shall not bind the assignee, for it is but a personal contract and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. (*Spencer's Case*, 1 Smith's L. Cas. 118.) Covenants will not run with personal property. (Addison on Contracts, 321; *Splidt v. Bowles*, 10 East Rep. 279.)

Until the happening of a breach of the condition of the bond Tileston had no interest that was assignable at law. (22 Barb. N. Y. 110; 7 How. P. R. 492; 4 Duer, 74; *Mitchell v. Winslow*, 2 Story R. 630; *Field v. The Mayor of New York*, 2 Seld. 186; *Bibend v. Insurance Company*, 30 Cal. 78; *Coolidge v. Ruggles*, 15 Mass. 338; 46 Barb. N. Y. 84; 8 Bacon Ab. 280; *Jackson v. Waldron*, 15 Wend. 180.) When the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made requires, the contract is void. (*Hitchcock v. Coker*, 6 Adolph. & Ellis, 106; *Chappelle v. Brockway*, 21 Wend. 157; *Jarvis v. Peck*, 10 Paige Ch. 123; *Lawrence v. Kidder*, 10 Barb. N. Y. 641.)

When Tileston sold out and went away without notifying respondent of the assignment, the latter had a right to suppose that the purposes of the contract were ended. (*Doll v. Anderson*, 27 Cal. 243; Williams on Per. Prop. 321; *Comstock v. Farnum*, 2 Mass. 97; *Van Veehten v. Graves*, 4 John. 403.)

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A policy of insurance is not assignable before loss so as to enable the assignee to recover after loss. After loss it becomes a debt and may be assigned. (2 Parson. on Con. 450; *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Wilson v. Hill*, 3 Metcalf, 68; 1 Iowa, 408.)

J. H. Reed, for Respondent.

This was not an equitable assignment and under the protection of a Court of Chancery, and to have brought suit in the name of Tileston for the use of respondent would have been in contravention of our statute, which requires actions to be prosecuted in the name of the real party in interest. (Voorhees' N. Y. Code, 96; 2 Seld. 179.) This was not a contract in restraint of trade and the assignment was valid. (8 Mass. 223; 3 Bing. 322; 6 Adolph. & Ellis, 438; *Id.* 959; *Mitchell v. Reynolds*, 1 Smith L. Cas. 181 and notes; 1 Estee Pl. 58; 21 Wend. 157; 22 Wend. 201; 9 Cal. 325.)

A policy of insurance may be assigned before any liability is fixed on the company by the burning of the property or the death of the party insured, and the company will be liable to the assignee after the event happens fixing their liability. (*Hurlstone v. Bonds*, 9 L. L., 1 Leigh's N. P. 639; *Wright v. Rider*, 36 Cal. 356; 2 Abb. Dig. 75; 6 Cal. 258.)

By the Court, PRIM, C. J.:

The bond upon which this action is predicated was entered into between appellants and one Tileston, the assignor of respondent. Shannahan, one of the appellants, was in partnership with respondent in a music and picture store in the city of Portland, and sold out his interest in the concern to one Tileston. On the same day the appellants jointly executed to said Tileston a bond in the sum of \$500 liquidated damages, to be paid to Tileston in case Shannahan should at any time within five years thereafter engage in the music and picture business in said city of Portland. It also appears that prior to the commencement of this action Tileston sold out all his interest in this store to his partner, the present respondent, and left the State. After Tileston sold out and left the State, and prior to the com-

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mencement of this action, Shannahan purchased several pianos and exhibited them for sale, and sold three of them at a profit of thirty dollars each. At the time Tileston sold out his interest in the business to respondent, he also turned over to him the bond; and afterward, and prior to the alleged breach thereof by Shannahan, he transferred it to him by assignment in writing. The Court below, in construing the bond, found as a matter of fact that it was the intention of the parties that it should be for the protection and advantage of the business sold, whether carried on by said Tileston in person, or by his assignees. The Court also found as a conclusion of law, that said bond was given as a protection in business, and as such was assignable with the transfer of the business from Tileston to Hillman.

As I understand the ruling of the Court, it amounts to this: The covenant with Tileston was not a mere personal contract with him for the protection of his own interest in the business in which he was engaged at the time, and while he should continue in the business personally, but it was such a covenant as passed with the business, and thus became attached to and ran with it, so as to give his assignee the same rights under the bond he had while carrying on the business personally. This seems to be the only theory consistent with the idea that Shannahan had committed such a breach of the bond as would enable respondent, as assignee, to maintain this action in his own name, unless it was for a breach committed while Tileston was engaged in the business himself. This is not pretended, as the only breach complained of occurred after he had sold his interest in the business and left the State.

There is a doctrine in the law-books that certain covenants made by parties standing in certain relations to each other, in relation to real estate, run with the land, in whose hands soever it may come. But I am not aware that any case has been cited in which it has been held that this doctrine is applicable to contracts or covenants made in relation to personal property.

It was resolved in *Spencer's Case* (1 Smith's Lead. Cas. 117), "If a man leases sheep, or other stock of cattle, or

any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a *personal contract* and wants such *privity* as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the lease of personal goods there is not any *privity* nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators who represent him."

In *Hurd v. Curtis* (19 Pick. 459), the owners of different mills, who drew the water which they used from the same stream and dam, entered into an agreement by which they covenanted to use water-wheels of a certain power and construction. Subsequently, one of the mills was conveyed to the defendant and an action brought against him for a violation of this agreement. The Court held the covenant *personal*, and that it could not be *extended* beyond the original parties, as there was no *privity* in estate or contract between plaintiff and defendant, although the covenant in that case was by its terms extended to heirs and assigns, etc. (*Webb v. Russel*, 3 T. R. 402.)

The case of *The California Steam Navigation Co. v. Wright* is cited and relied upon. In that case, Wright, the defendant, being the owner of certain steamboats, entered into a contract with one Chenery, also the owner of boats, whereby, in consideration of fifteen thousand dollars, to be paid by Chenery, Wright covenanted that he would not permit any boat in which he was interested to navigate certain waters of the State, at any time within three years from the date of the contract; and if he failed to comply with his contract, he would pay to Chenery, or his assigns, etc., the sum of \$15,000. This contract was assigned by Chenery to the plaintiff; whether before or after breach does not appear. It does appear, however, that Wright was notified of the assignment, and received of the plaintiff the full sum of money which Chenery had agreed to pay. The Court

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said: "It has always been the policy of our law to construe contracts according to the intention of the parties, and it was evidently the intention of the parties that the contract should be assignable, as it is made payable to Chenery, his heirs," etc. We think it is very properly urged in the case at bar, that "if this rule is to work both ways, then the lack of such words as 'heirs,' 'assigns,' etc., is evidence of the want of such intention."

But in the California case the Court further said: "And as it appears * * * * that the defendant was notified of the assignment, and received from the plaintiff the full sum of money which Chenery contracted to pay, he is estopped from denying that the contract was assignable."

In the case under consideration, there are no such words as heirs or assigns, to indicate that it was the intention of the parties that the contract should be assignable, nor are there any circumstances from which it could be inferred that a new and original promise was made to Hillman at the time the bond and business went into his hands, or that would operate to estop appellants from denying that the bond was assignable. Then we hold that this bond was executed for the *personal* protection and indemnity of Tileston *alone*, while carrying on business in *person*, and did not extend to his assignee, as there was no privity between him and appellants.

It is insisted by respondent that the bond is a chose in action, and as such was assignable by Tileston to him, which assignment gave him the same right to maintain the action in his own name, as the real party in interest, that Tileston had. It appears from the allegations of the complaint that the assignment took place on the 8th day of July, 1870, and that the alleged breach did not occur until afterwards, to wit, on the 20th day of July, 1870. The bond being a conditional one, Tileston himself could have no right of action upon it against the obligor until there was a breach of that condition by Shannahan. Then how could Tileston assign that to another which he did not have himself? A chose in action is defined by Burrell's Law Dictionary to be a *thing in action*—a thing of which one has

not the possession or actual enjoyment, but only a right to demand it by action. 2 Kent, 356, says: "Money due on a bond, note or mortgage or other contract is a chose in action—a right to recover damages for a breach of covenant or a tort is a chose in action. There must be something due on a bond, mortgage or other contract, before the party holding it can bring his action to recover the amount due." Tileston had the bond in his possession, but until the happening of a breach of the condition of it he had no right of action or chose of action to assign; his interest in the bond prior to that time being a mere possibility or contingency, not assignable at law. Sec. 27 of our Code does not alter the rule as to the assignability of choses in action, so as to make those assignable which were not so before; but it simply provides that the real party in interest may sue in his own name, without being required, as formerly, to sue in the name of his assignor, for his use. (22 Barb. 110.)

Respondent, in his brief, asks: "Cannot a policy of insurance be assigned before any liability is fixed on the company by the burning of the property, or the death of the party insured, and will not they be liable to the assignee after the event happens fixing their liability?" This question has long since been answered and settled in the negative by the ablest jurists of both England and America. In *Lynch v. Dalzell* (4 Bro. Parl. Rep. 431), which was an insurance against fire, Lord Chancellor King said:

"These policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as an incident thereto, by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damages as they may sustain. The party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without express consent of the office."

The same doctrine was asserted by Lord Hardwicke in the

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case of *Saddler's Company v. Babcock* (2 Ark. 534). In the case of *Carpenter v. The Providence Washington Insurance Company* (16 Peters, 503), Story, J., said: "An assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and *his alone*, that is designed to be covered, and when he parts with his title to the property, he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor; and as to the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property or an incident thereto."

The same doctrine is laid down by Chief Justice Shaw in the case of *Wilson v. Hill* (3 Met. 68, 69.) He said: "An insurance of buildings against loss by fire * * * is in effect a contract of indemnity with the owner or other person having an interest in the preservation of the buildings * * * to indemnify *him* against any loss he may sustain, in case they are destroyed or damaged by fire. The contract was to indemnify the assured; if *he* has sustained no damage, the contract is not broken."

He further said: "These considerations, however, do not apply to a case where the assured, *after loss*, assigns his right to recover that loss."

It would then amount to a right of action, which could be assigned by him the same as any other chose in action. And so in the case under consideration, at any time after the happening of a breach of the condition of the covenant, Tileston would have had a right of action to recover the damages agreed upon in the bond. And having a right of action, there can be no doubt that such right was assignable to another, who could maintain an action in his own name, as the real party in interest. But in this case it appears he undertook to assign his right of action prior to the happening of any breach of the covenant; consequently the assignment amounted to nothing, as at that time he had no right of action to assign.

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The Court being of the opinion that the judgment of the Court below cannot be sustained upon the facts appearing in the record in this case, it is ordered that the judgment of the Court below be reversed.

Mr. Justice McARTHUR dissented.

EDWARD CARNEY, RESPONDENT, v. CHARLES BARRETT, APPELLANT.

LIABILITY OF A PARENT ON CONTRACTS OF HIS MINOR CHILD.—In general a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority is proved, or the circumstances be sufficient to imply one.

COURTS MAY MAKE RULES.—Under our system all Courts have certain powers to be exercised for the purpose of methodically disposing of all cases brought before them. They can establish such rules in relation to the details of the business as shall best serve this purpose, having proper regard for the rights of parties litigant, as guaranteed and recognized by the Constitution and the laws.

APPEAL from Multnomah County.

This is an action upon a contract to recover one hundred and five dollars for board and lodging furnished by plaintiff to defendant's infant son for a period of fourteen weeks. The answer admits the defendant's liability for two weeks' board and lodging, and denies as to the remainder of the time, twelve weeks, and pleads a set-off of nineteen dollars and fifty cents, and prays judgment for four dollars and fifty cents, the difference between the value of two weeks' board and nineteen dollars and fifty cents. The set-off is not denied.

Upon the trial the plaintiff was sworn as a witness, and testified that about the 5th day of July, A. D. 1870, plaintiff was and still is the proprietor and keeper of a hotel in the city of Portland, in said county; that on or about said day the defendant, accompanied by his minor son, came to said hotel, and defendant contracted with plaintiff for board and lodging for his said son for the period of one week, defendant agreeing that he would pay for the same; that plaintiff

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135	486

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agreed with defendant to board and lodge said boy a week, and showed defendant a room in said hotel which said boy might occupy, which room was accepted by defendant for the boy, who boarded and lodged with plaintiff for a week, at the expiration of which time defendant called at the hotel and renewed his contract to pay for board and lodging for the boy for another week; and plaintiff accordingly furnished said boy with board and lodging for the second week; that at the expiration of the second week, the defendant called again at the hotel and informed plaintiff that he would not pay or be responsible for the board and lodging of said boy at said hotel any longer; that when said boy came in, plaintiff informed him of what his father had said, and the plaintiff requested the boy to seek accommodations elsewhere, which the boy refused to do; that plaintiff immediately called on defendant and informed him that his son refused to leave the hotel, and requested defendant to come to the hotel and take him away, which defendant declined to do, saying he would not be responsible or pay for his board and lodging any longer, and instructing the plaintiff to put the boy out if he refused to leave the hotel; that plaintiff again informed said boy of what his father had said, and renewed his request to the boy to depart from the hotel, which the boy again refused to do; that plaintiff thereupon called on defendant the second time and apprised him of his son's refusal still to quit the hotel, and again requested defendant to come to the hotel and take his son away, which defendant again declined to do, saying he would not pay for the board and lodging of the boy at said hotel any longer than the two weeks; and defendant instructed plaintiff, if the boy persisted in refusing to quit the hotel, to kick him out; that the boy remained at plaintiff's hotel for fourteen weeks in all, or twelve weeks after defendant refused to be longer responsible for his board and lodging; at the expiration of which time the boy went to Salem to attend the State Fair, and plaintiff availed himself of the opportunity to put another man in the room which had been occupied by the boy, and thus got rid of him; that during the time the boy occupied the room, he

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generally carried the key to it in his pocket, but that plaintiff had other keys, by means of which the servants obtained access to the room to clean it up and make the bed; that board and lodging at said hotel during said fourteen weeks, was reasonably worth six or seven dollars per week, in gold coin. This was all the evidence offered by either party.

In charging the jury the Court instructed the jury, "that the question of defendant's liability in this action was a mixed question of law and fact; that it had been argued on behalf of the plaintiff, that possession of the room by the defendant's son was possession by the defendant, which matter the Court left to the jury to inquire of and determine, as well as the further point, whether or not it was defendant's duty to have gone to the hotel, and have taken his son away from said hotel; that cases could easily be imagined where it might become the duty of a person placing another at a hotel to board and lodge, to take such person away again; as, for instance, if the person so placed in the hotel were a lunatic, or a helpless invalid. And that the Court left it to the jury to determine whether such a principle of duty were applicable in this case. And that the Court also left it to the jury to determine whether the plaintiff removed defendant's son from said hotel as soon as he reasonably could after defendant notified plaintiff that he would not be any longer responsible for the boy's board and lodging, and would not pay for the same."

And, at the request of plaintiff's counsel, the Court further instructed said jury as follows, to wit: "If the father placed the minor in possession of the premises, the possession was that of the father and not the son, the son being the agent of the father so far." At the request of defendant's counsel, the Court gave a number of special instructions to the jury, but declined and refused to give two others that were asked, because they had not been submitted to the Court for its inspection at the proper time, in conformance to a rule of practice heretofore adopted by the Court, requiring all written special instructions desired by either party to be submitted for inspection prior to the commencement of the final address of counsel holding the

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affirmative of the issues before the jury. To this ruling counsel duly excepted, and the exception was allowed. The jury found a verdict for the plaintiff, and judgment was rendered thereon.

Bronaugh & Callin, for Appellant.

O. P. Mason and Charles Gardner, for Respondent.

By the Court, McARTHUR, J.:

Commercial communication with infants has been productive of much litigation, and hence we find abundant authority to guide us to a correct conclusion in the case now in hand.

The evidence shows that after the expiration of the contract between the plaintiff and the defendant, the plaintiff allowed the defendant's minor son, Arthur, to board and lodge at his hotel for a period of twelve weeks, notwithstanding the defendant informed him that he would not be responsible for said son's board and lodging, and the plaintiff, assuming the legal liability of the defendant therefor, seeks to recover reasonable compensation for the entertainment furnished.

In general, a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority is proved or the circumstances be sufficient to imply one. (*Varney v. Young*, 11 Vermont, 258; *Hunt v. Thompson*, 3 Scammon, 179; *Angel v. McLellan*, 16 Mass. 28; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Owen v. White*, 5 Porter, 435; *Gordon v. Potter*, 17 Vermont, 350; *Raymond v. Loyl*, 10 Barbour, 483.)

Actual authority is not claimed, but it is urged that the circumstances of the case raise the implication of the defendant's liability for the necessities furnished.

The most favorable construction for the plaintiff that can be put upon the testimony flatly negatives any such implication.

From all the facts in the case, we are of opinion that after the expiration of the contract between the plaintiff and de-

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fendant, and after the notification of the defendant, he would not be responsible for the further entertainment of his son. It was the duty of the plaintiff to have closed his doors to the son, unless indeed he relied upon the son's capacity and intention to compensate him. Under some circumstances a disregard of this duty has been deemed good ground for an action of damages against the innkeeper for harboring the infant. (*Everett v. Sherfey*, 1 Iowa, Clark, 356, 364; 2 Hilliard on Torts, 520.)

In the case in hand the father was under no obligation to remove the son, as he would have been had the son been a lunatic, a helpless invalid, or an infant of tender years, and placed at the hotel by the father's authority, or under circumstances sufficient to imply his authority. Instead of being a lunatic, a helpless invalid or an infant of tender years, it *seems* that the son Arthur was at the time a youth bordering upon the verge of manhood and in perfect health, so as to be able to support himself by his own industry. This fact affords additional reason why the defendant should not be held liable for his maintenance. As the general instructions of the Court below were based upon conclusions at variance with our views as just indicated, they were, therefore, erroneous.

The refusal to give the jury several special instructions requested by the appellant's counsel, upon the ground that they were presented too late under a rule of Court, is charged as error. It appears that a rule has been formally adopted by the Circuit Court of the State of Oregon for the county of Multnomah, requiring counsel in a cause, when they desire special instructions to be given to the jury, to present the same in writing to the Judge before the last address of counsel to the jury. The power and authority of the Court to make such rule is denied by counsel, hence the refusal to give the desired instructions is charged as error. Under our system all Courts have certain inherent powers to be exercised for the purpose of methodically disposing of all cases brought before them. They can establish such rules in relation to the details of business as shall best serve this purpose, having proper regard for the rights

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of parties litigant as guaranteed and recognized by the Constitution and the laws. This principle is recognized in 3 Binney, 417, and 2 Sergeant & Rawle, 253, the decisions in which cases are approvingly referred to in 2 Reed's Blackstone, 439-40. We cannot discover that it conflicts with any provision of our Code. Indeed, we think it a salutary rule, and one well calculated to suppress that loose system in submitting special instructions which has heretofore prevailed to a greater or less degree in all the Courts of the State, to the annoyance and embarrassment of both the bar and the bench.

The Court below, at the request of the respondent's counsel, instructed the jury that "if the father placed the minor in possession of the premises, the possession was that of the father and not of the son—the son being the agent of the father so far." The application of the principles of the law of agency to cases of this kind is recognized in some instances and to a limited extent in many English and in some American cases. (1 Parsons on Contracts, 300.) In this case, however, the instruction was calculated to mislead the jury, for the evidence shows that the appellant, after the expiration of the second week, called upon the respondent and distinctly told him that he would not pay or be responsible for the board and lodging of his son at the hotel any longer. The contract between the respondent and appellant expired at the end of the second week. Up to and including that time the appellant was willing to pay for his son's entertainment; beyond that time he was not, and so informed the respondent. It was then the duty of the innkeeper, as already indicated, to have closed his doors to the defendant's son and refused him all further entertainment, unless he expected payment at the hands of the son himself.

Judgment reversed.

Statement of Facts.

DELIA B. LEWIS, RESPONDENT, v. DAVID R. LEWIS,
APPELLANT.

EVIDENCE.—Unless the evidence shows the alleged mistake clearly and satisfactorily, it is not sufficient to establish cause for the correction of a deed.

PARAMOUNT BOUNDARIES.—Where the permanent and visible or *ascertained* boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

IDEM—JURISDICTION TO ASCERTAIN.—The locality at which a lost stake was set may be ascertained as well in a Court of law as by a suit in equity.

APPEAL from Polk County.

The plaintiff filed a complaint in ejectment, and the answer sets up what is relied upon as an equitable defense.

It is admitted that in 1855 the defendant, being the owner of a land claim embracing the premises in controversy, sold a part of it at six dollars per acre and executed a deed, under which the plaintiff claims, to Ira A. Hooker, the plaintiff's grantor, conveying to Hooker the southwest part of the land claim by the following descriptive words: Beginning at the southwest corner of the land claim and "running thence north 1°, 24' east fifty-nine chains to a stake; thence east forty chains; thence south 1°, 25' west forty-three and twenty one-hundredths chains; thence south 68°, 25' west forty-three chains to the place of beginning; containing one hundred and four acres." A piece of land four and one-half chains in width north and south and forty chains long, off the north end of the land which corresponds to those measurements, is the parcel in controversy.

The defendant claims that the stake mentioned in the deed, as at the termination of the line first described, was in fact only fifty-four and one-half chains from the place of beginning; that the parcel sold contained only eighty-six acres; and that there is an error in the deed in that respect; and that by mistake the deed was so written as to include the premises in controversy. He avers that he has tendered back to the plaintiff the purchase-money received by him for the surplus eighteen acres; and he asks that the deed be

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reformed and that the plaintiff's action be barred. A decree was rendered in favor of the plaintiff.

C. G. Curl, J. A. Applegate and John Kelsay, for Appellant.

Ben. Hayden and P. C. Sullivan, for Respondent.

By the Court, UPTON, J.:

The answer in this case does not specifically point out in what particular there is a mistake in the deed sought to be reformed, but describes by metes and bounds a tract fifty-four and one-half chains in length, north and south, as the tracts actually sold, and avers that by mistake the deed was so drawn as to include the premises in controversy. The record shows that the only controverted question of fact on the trial related to the locality of the stakes set up by the parties on the day of the execution of the deed, as monuments of the northwest and northeast corners of the parcel actually sold.

It is admitted that the parties, after having agreed upon the price per acre, and before determining the size or shape of the parcel, went on to the ground with a surveyor, and that they there agreed upon the particular parcel to be sold, measured its west side, and set up a stake to mark the northwest corner of the parcel selected; and that the north line of the parcel actually sold runs due east from the place of that stake. On the trial, the controverted question of fact was, whether that stake was in fact placed fifty-nine chains from the southwest corner of the land claim, as indicated by the figures noted in the deed, or whether the distance is erroneously noted in the deed, and the stake was in fact planted at a point fifty-four and one-half chains from the place of beginning: in other words, whether that stake was in fact placed at the northwest or at the southwest corner of the parcel described in the complaint and now in controversy.

The cause having been treated by both parties as one cognizable in equity, we have carefully examined the evi-

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dence, and we do not find it clearly and satisfactorily proved that the place selected by the parties as the northwest corner of the parcel sold was not fifty-nine chains from the southwest corner of the land claim. The evidence, therefore, is not sufficient to present a cause for correcting a deed, according to the decisions made by this Court in *Shively v. Welch* (2 Ogn. 288), and in *Newsom v. Greenwood*, decided at the present term.*

That it may not be inferred that this Court, as a Court of equity, has assumed jurisdiction of the subject-matter controverted in the proofs adduced by the respective parties in this cause, it is deemed proper to advert to another reason for affirming the action of the Circuit Court in denying equitable relief.

If the defendant could have established by evidence before a jury that on the day of selecting the land and at the time of executing the deed, the parties by mutual consent fixed the northwest corner of the parcel selected at the point fifty-four and one-half chains from the place of beginning, and there drove a stake to stand as a monument of that corner, there would be no occasion for correcting or reforming the instrument. The deed would then, without correction, call for the land the defendant says it should be made to call for, and the repugnance of the measurement to the known boundary or monument would be disregarded by the Court, whether such repugnancy be made to appear in an action or in a suit.

“Where the permanent and visible or *ascertained* boundaries or monuments are inconsistent with the measurement either of lines, angles or surfaces, the boundaries or monuments are paramount.” (Civ. Code, § 845; *Preston's Heirs v. Bowman*, 6 Wheat. 580.)

“A conveyance is to be construed in reference to its distinct and visible locative calls, as marked or appearing upon the land, in preference to quantity, course or distance.” (*Van Wyck v. Wright et al.*, 18 Wend. 157.) This rule applies upon ascertaining the place of the monument, although

* *Ante*, p. 119.

Points decided.

its locality had become uncertain. (*Jackson v. Britton*, 4 Wend. 507.)

If the visible monuments have disappeared but their places can be ascertained, the construction of the deed should of course be the same now as on the day it was executed.

"Where practical location and a long acquiescence have been held conclusive, it has been, 'not upon the notion that they are evidence of a parol agreement establishing the line,' but because they are of themselves proof that the location is correct, of so controlling a nature as to preclude evidence to the contrary." (*Baldwin v. Brown*, 16 N. Y. 359.)

In this case there is no reason why the locality at which a lost stake was set could not be determined and the true construction of a deed ascertained as well in a Court of law as by a suit in equity. To lay the foundation for correcting a deed something more should be shown than an ambiguity that can be explained by evidence, or a repugnance between distances noted and monuments agreed upon.

The defendant invokes equity jurisdiction to correct a mistake, but directs all his proofs to establish a fact, which, if true, shows that the deed needs no correction. We can see no reason for resorting to equity; and treating the case as an action, there is no ground for reversing the judgment. It should therefore be affirmed.

STATE OF OREGON, RESPONDENT, v. JAMES OFFICER, APPELLANT.

JURISDICTION OF COUNTY COURT.—The County Court is practically and essentially a Court of special and limited jurisdiction.

IDEM—WHAT RECORD SHOULD SHOW.—The record of the County Court should show affirmatively that it had jurisdiction of the person and subject-matter affected by its proceedings.

IDEM—WHAT RECORD INSUFFICIENT.—A record of the County Court, made in the matter of the location of a county road, which reads, "The bond and proof of posting notices having been made to the satisfaction of the Court," etc., is insufficient to show that the Court had acquired jurisdiction of the persons of parties whose rights might be affected by the location of such road.

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20* 825
26* 307

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Argument for Respondent.

APPEAL from Clackamas County.

At the October Term, 1870, of the Circuit Court for Clackamas County, the appellant, Officer, was tried and convicted on an indictment charging him with having obstructed a public highway in said county.

On the trial of the cause the State, to maintain the charge preferred, offered in evidence the record of the County Court appointing viewers to lay out the county road, for obstructing which appellant was indicted. This record, so far as it refers to the proof of the posting of notices of the application for the location of the road, reads: "The necessary bond and proof of posting notices having been made to the satisfaction of the Court, it is hereby ordered that the prayer of said petition be granted," etc. To the introduction of this record as evidence appellant objected; but the Court allowed the same to be read to the jury; to which ruling appellant excepted. Several grounds of error were assigned, but none were much relied upon by counsel for the appellant in the argument of the cause, except the objection to the sufficiency of the record above quoted; which involves the only question necessary to be considered.

The bill of exceptions shows that no other proof or reference to the posting of notices was made by the State than that contained in the record referred to.

S. Huelat, for Appellant.

The State must prove that the way in question is a public highway. (Roscoe's Crim. Ev. 562.)

Jurisdictional facts must appear affirmatively in the proceedings of inferior tribunals. (*Thompson v. Multnomah County*, 2 Ogn. 34; 1 Smith L. Cas. 818, 832, 843; 2 Abb. Dig. 257; *Frees v. Ford*, 2 Seldon, 176; 6 Barb. N. Y. 607; *Hunsaker v. Coffin*, 2 Ogn. 107; 3 Abb. Dig. 290; *Johns v. Marion County*, ante, p. 46.)

Addison C. Gibbs and C. B. Upton, for Respondent.

The existence of a road as a legal highway is to be learned from and proven by the order for its establishment. (1 Ogn. 216.)

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When the evidence as to notice was once before the Court, it then had full jurisdiction to decide as to its weight, or as to any other matter pertaining to the road, and thereafter all the proceedings must be presumed to be regular and legal. (1 Saund. 74; 4 Cow. 296; 2 Cow. and Hill. Notes, 779; 1 Smith L. Cas. 816.)

By the Court, BONHAM, J.:

The question to be determined in this case is, whether the record of the County Court above referred to shows the necessary jurisdictional facts to entitle it to be read in evidence for the purpose for which it was introduced, to wit: to show that the road charged to have been obstructed was a legally established public highway.

Section 3 of Chapter 50, Miscellaneous Laws, reads:

"When any petition shall be presented for the action of the County Court for laying out, alteration or vacation of any county road it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding County Court, and also in three public places in the vicinity of said road or proposed road, thirty days previous to the presentation of said petition to the County Court, notifying all persons concerned that application will be made," etc.

In determining the question whether the record of the County Court referred to shows upon its face such a want of jurisdiction as to subject it to be thus collaterally attacked, it would be proper to consider the character of such Court as recognized and classified by the Constitution and laws of this State. While our Constitution on this subject is not as clear and definite as might be desired, yet, in construing its whole language in reference to the same together, we think that the County Court is regarded by that instrument as practically and essentially a Court of special and limited jurisdiction. It is true that § 1 of Art. VII classifies the County Courts with Courts of general jurisdiction; to be defined and limited, however, by law, in accordance with this Constitution. But by reference to §§ 12 and 13 of the article of the Constitution referred to, it will be ob-

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served that in providing *especially* for the organization and jurisdiction of County Courts, they are practically treated as Courts of special and limited jurisdiction. At all events, it has already been judicially determined by this Court, in several cases, that County Courts are to be regarded as Courts of special and limited jurisdiction. (*Thompson v. Multnomah County*, 2 Oregon, 37; *Johns v. Marion County*, ante, p. 46.)

In the former case the Court says: "It is admitted that the County Court or Board of County Commissioners, so far as it exercises judicial power, is a Court of special and limited jurisdiction." And further: "Before the Court could take a step, or acquire any authority, two things must plainly have been done: First. A petition of twelve householders. Second. Notice as provided above. Without these facts the Court was no more than a stranger to every person or interest involved in the proceeding; and until the jurisdiction was acquired no intendment of regularity or power operates in its favor. It nowhere appears in the record, by way of allegation or recital, that any such notice was given, either at the court-house door or in the vicinity of the road. The omission was fatal to the proceedings of the Board of County Commissioners, as clearly showing that no jurisdiction was at any time gained over the subject-matter to be adjudicated upon."

In the case of *Hahn v. Kelly* (34 Cal. 409), which is a leading case, and one evincing great ability and research, in reviewing the question of the jurisdiction of Courts generally, the Court says: "The presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of Superior Courts, or Courts of general jurisdiction, * * * * but that they are not in favor of the jurisdiction and regularity of the proceedings of inferior Courts, or Courts of limited jurisdiction; and parties who claim any right or benefit under their judgments must show their jurisdiction affirmatively."

The record in the case of *Thompson v. Multnomah County* differs from that in the case under consideration in this respect only: In the former it appears that no reference

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was made whatever to the proof of the posting of notices, while in the latter the language of the record is, "Proof of posting notices having been made to the *satisfaction* of the Court," etc. Does this language disclose the necessary jurisdictional facts to warrant the Court in proceeding, is the question. The County Court in its proceedings by the location of public highways to condemn the lands of private persons to public use, is only required to cause constructive notice to be given by the petitioners of their application for that purpose. This notice is to be given by posting the same at the *time*, at the *places*, and in the *manner* prescribed by law; and the language of the record should show affirmatively that this law had been strictly complied with.

We do not think that it is sufficient to say that the proof of the posting of notices was made to the *satisfaction* of the Court. That proof which might satisfy the Court might not satisfy the law. That proof which might satisfy the Court might not justly and lawfully satisfy the persons whose private property is sought to be condemned to public use. If it is sufficient to say that the Court is *satisfied* with the proof of the posting of notices, without any *showing* as to the time, place or manner of posting, then the only question upon this subject would be one in the discretion of the Court, which, when once exercised, would be a finality, however erroneous the judgment of the Court might have been.

We do not think that the record of the County Court in this case was sufficient to show that it had acquired jurisdiction of the persons of those affected by its proceedings. The judgment of the Court below is reversed.

STATE OF OREGON, RESPONDENT, v. ROBERT
WILEY, APPELLANT.

POWER OF THE LEGISLATURE.—The Legislature had the power to confer upon the Police Judge of the city of Portland the jurisdiction and authority of a Justice of the Peace within the limits of said city, but it had no power to limit that jurisdiction to criminal cases.

JURISDICTION OF POLICE JUDGE, WHEN ACTING AS A JUSTICE.—The jurisdiction and authority of the Police Judge, when acting as a Justice of

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the Peace, are identical with that of all other Justices of the Peace, and extend alike to civil and criminal cases.

VOID PROVISIONS IN STATUTE—EFFECT OF.—When some of the provisions of a statute are constitutional and others unconstitutional, the latter only are void.

APPEAL from Multnomah County.

The Grand Jury of Multnomah County indicted Robert Wiley for the crime of perjury, alleged to have been committed on his examination as a witness on the trial of a cause in the Police Court, in the city of Portland, before Hon. D. C. Lewis, Police Judge, in which the State of Oregon was plaintiff and Joseph Perry and Caroline Wilson were defendants, they being then and there charged with and tried for the crime of assault and battery. On said indictment Wiley was tried in the Circuit Court of the State of Oregon for the County of Multnomah. Upon the trial, the Prosecuting Attorney offered in evidence the docket of the Police Judge and oral testimony to show that Wiley had taken an oath before said officer in an action in which the State of Oregon was a party. To the introduction thereof Wiley's counsel objected, urging that the Police Judge had no legal authority to assume the jurisdiction and power of a Justice of the Peace, and as such, administer oaths to witnesses in State cases or to try such cases. The Court overruled the objection, and admitted the evidence, to which ruling appellant's counsel then and there excepted. The jury returned a verdict of guilty, and Wiley, standing on his exception, appeals to this Court.

John Creighton, for Appellant.

Theodore Burmester, and Gibbs & Upton, for Respondent.

By the Court, McARTHUR, J.:

The principal question to be decided in this case is, whether or not the Police Judge of the city of Portland—a municipal corporation—has any legal authority to act in the capacity of a Justice of the Peace, and as such, to try criminal actions and administer the necessary oath to

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the witnesses therein. The jurisdiction of the Police Judge is defined in §§ 155, 156 and 157, p. 130-1 of the Laws of Oregon, 1870, which provide as follows:

"SEC. 155. The Police Judge has jurisdiction of all crimes defined by any ordinance of the city of Portland, and of all actions brought to enforce or recover any forfeiture or penalty declared or given by any such ordinance.

"SEC. 156. The Police Judge has the jurisdiction and authority of a Justice of the Peace for the county of Multnomah, within the limits of the city of Portland, in criminal matters, and shall be subject to the general laws of the State, prescribing the duties of a Justice of the Peace, and the mode of performing them. He shall keep a record of all proceedings before him.

"SEC. 157. All criminal proceedings before the Police Judge or in the Police Court are governed and regulated by the general laws of the State applicable to Justices of the Peace and Justices' Courts in like or similar cases," etc.

It will be noticed that § 156 confers upon the Police Judge the jurisdiction and authority of a Justice of the Peace, for the county of Multnomah, within the city of Portland. The power of the Legislature to enact a law investing the Police Judge of any municipal corporation, *ex-officio*, with the jurisdiction and authority of a Justice of the Peace, either generally or limitedly, was discussed at considerable length by counsel. It is not, however, deemed necessary to judicially explore this question at this time, for the reason that a similar one was presented and decided in *Ryan v. Harris* (2 Ogn. 177), in which case it was held that the Legislature could rightly confer upon the Recorder of the city of Portland (who executed similar functions to the Police Judge) the power and authority of a Justice of the Peace within the corporate limits; and this decision was approved in *Craig v. Mosier* (2 Ogn. 324).

Passing from this, it was insisted by counsel that the limitation and restriction of the jurisdiction and authority of the Police Judge, when acting as a Justice of the Peace, to *criminal matters alone*, renders the entire section of the law

void, for the reason that it contravenes Article IV, § 23, Subdivision 1, of the State Constitution, which declares that "the Legislative Assembly shall not pass special or local laws in any of the following cases, that is to say:

"1. Regulating the jurisdiction and duties of Justices of the Peace and Constables."

In view of this constitutional provision and of the decision in *Ryan v. Harris*, we are impelled to the conclusion that the limitation and restriction of the jurisdiction and authority of the Police Judge when acting as Justice of the Peace to *criminal matters* is unconstitutional. There is no authority known to our laws for restricting the jurisdiction of a Justice of the Peace to one class of cases, whether civil or criminal. He must exercise jurisdiction and authority in both classes.

Admitting this conclusion, it was claimed that the restriction does not invalidate the entire section, but only overthrows that part thereof expressing the limitation. An examination of the authorities will enable us to reach a speedy and satisfactory decision on this point.

"The principle that a statute is void," says Mr. Sedgwick, in his elaborate and admirable treatise on the rules governing the interpretation and application of statutory and constitutional law, p. 489, "only so far as its provisions are repugnant to the Constitution, that one provision may thus be void and this not affect other provisions of the statute, has been frequently decided." In *Gibbons v. Ogden* (9 Wheaton, 1), and *The City of New York v. Miln* (11 Peters, 102), the Supreme Court of the United States recognized this as a settled principle of the law of construction. In *Fisher v. McGirr* (1 Gray, 22), it was declared "that where a statute has been passed by the Legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act not obnoxious to the same objection, will be held valid and have the force of law. There is nothing inconsistent in declaring

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one part of the same statute valid and another part void." In *Commonwealth v. Kimball* (24 Pick. 361), and in *Norris v. Boston* (4 Metcalf, 288), a similar conclusion was arrived at. In *The People ex rel. Attorney-General v. Hill* (7 Cal. 103), Murray, C. J., in delivering the opinion of the Court, adhered to the same principle. The decisions upon this point are so abundant that it has not been thought necessary to refer to any save those which may well be considered as leading cases.

It follows that the clause "*in criminal matters*" should be stricken from § 156, and the remaining portion of the section stand as law. Also, that the jurisdiction and authority of the Police Judge, when acting as Justice of the Peace, are identical with that of all other Justices of the Peace and extend alike to civil and criminal cases. That officer had jurisdiction of the case in which the appellant was called to testify, and the witness was legally as well as morally bound to testify the truth. If he willfully testified falsely he was guilty of perjury. Therefore, the testimony offered by the Prosecuting Attorney on the trial in the Circuit Court, tending to show that Wiley had been a witness in a case tried before the Police Judge, acting as Justice of the Peace, and that he testified falsely therein, was properly admitted.

Judgment affirmed.

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STATE OF OREGON, RESPONDENT, v. E. L. PERHAM,
APPELLANT.

INDICTMENT.—An indictment under § 636 of the Criminal Code charging the defendant with having received two hundred and fifty dollars feloniously for the payment of the amount of salary due him, should state the length of time the salary was unpaid or otherwise designate the service or duty charged for.

APPEAL from Wasco County.

The defendant was indicted under § 636 of the Criminal Code, and being convicted, was adjudged to pay a fine of

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four hundred dollars. He appeals from the judgment of the Circuit Court.

The only ground of error assigned is that the facts stated in the indictment do not constitute a crime.

The charging part of the indictment is as follows: "Said Perham, in the county aforesaid, on the fifth day of January, A. D. 1870, being then and there an officer of Wasco County, Oregon, to wit, the County Judge of said county, duly elected and qualified as such, and then and there acting as such Judge, did then and there willfully, knowingly and feloniously receive a compensation other than that authorized by law for an official duty performed by said officer, to wit: the said Perham did then and there receive an order from the County Clerk of said county, on the Treasurer of said county, for the sum of fifty dollars; and also at the same time and place, an additional order from said Clerk for the sum of two hundred dollars, both of said orders *to be paid* out of the funds belonging to said county, and both of said orders being then and there issued in favor of said Perham for the payment of the amount of the salary due said Perham as such Judge up to the first day of January, A. D. 1870, when there was due to said Perham as such Judge the sum of two hundred dollars at said time and place."

Orlando Humason, and Hill, Thayer & Williams, for Appellant.

S. Ellsworth, for Respondent.

By the Court, UPTON, J.:

This case is very similar to that of *The State v. Packard*, decided at the present term. The defendant is indicted under § 636 of the Criminal Code, and the indictment does not describe the services or duty for which the compensation was received in such manner as to enable the Court to conclude from the facts stated whether or not the compensation received was "other than that authorized or permitted by law." The compensation is alleged to have been for

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salary, but the indictment does not state for what period of time the salary was unpaid.

It is also questioned whether under the facts assumed in the argument, the warrant for fifty dollars is not void and consequently no payment within the meaning of the statute.

The latter question is not necessarily involved, inasmuch as the indictment must be held insufficient, for reasons expressed in the case of *The State v. Packard*.

The judgment should be reversed.

D. W. FRAREY, APPELLANT, v. JACOB WHEELER AND JEMIMA J. WHEELER, RESPONDENTS.

REAL PROPERTY OF MARRIED WOMEN — SPECIFIC PERFORMANCE AGAINST.—

A specific performance will not be decreed by a Court of equity to compel a married woman to convey her real property upon a contract or covenant executed by her and her husband for that purpose during coverture.

IDEM.—But where a married woman, during coverture, joins with her husband in a covenant to convey her real property, and the covenantee advances money to the wife on the contract, or, with her assent, enters into the possession of the premises, and makes permanent improvements thereon, the money so advanced, and the value of such improvements (less the value of the use of such premises), will be decreed to be a charge upon such land until paid. Courts in protecting the rights of married women should not go so far as to encourage the perpetration of fraud by them.

APPEAL from Multnomah County.

On the 1st day of April, 1867, the respondents, Wheeler and wife, covenanted to and with appellant, to convey to him in fee simple, with the usual covenants of warranty, certain real estate held by said Jemima J., in her own right, under the Donation Law of September 27th, 1850. The consideration of this covenant was the payment at the time by appellant of twenty dollars in gold coin and his agreement to pay, one year after date, the further sum of three hundred and eighty dollars in like money. By the terms of the covenant appellant was to have, and did take immediate possession of the described premises. He alleges that during the time he held such possession he made valu-

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Argument for Appellant.

able and permanent improvements thereon, which greatly enhanced their value, although the use of the same yielded him no benefit. About the 1st day of August, 1870, he tendered to respondents the full balance of the purchase-price of said land, with lawful accruing interest thereon to that time, in gold coin, which they refused to receive, and refused to execute a deed to the premises.

Wherefore, appellant asks that the execution of the deed referred to be decreed, or that an accounting of the value of the improvements referred to and of the twenty dollars advanced be had and the same made a charge upon said land.

Respondents interposed a general demurrer to the complaint, which was sustained and the cause dismissed. From this order of dismissal appellant appeals.

W. W. Thayer and Charles Gardner, for Appellant.

The incapacity of a married woman at common law to contract did not proceed from a want of understanding or discretion, but was in consequence of the peculiar relation resulting from the marriage. She was placed under the power and protection of her husband, and deprived of the administration of property. (2 Kent's Com. 150.) Her personal property, *ipso facto*, with the marriage, went to the husband. He also became immediately seized, *jure uxoris*, of the freehold estate and entitled to the rents and profits, and, if issue were born alive, he took the estate absolutely for life as tenant by the curtesy. Her interest in everything she possessed at the time of the marriage at once became his, leaving in her only a residuary right, the enjoyment of which depended upon the contingency of survivorship. (2 Kent's Com. 130.)

"The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself." (2 Kent's Com. 320.) "The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants." (Id. 326; 4 Kent's Com. 441.) In accordance with this principle, Courts of equity have

Argument for Appellant.

instituted the doctrine of settlement, whereby property is secured to the separate use of married women, and it is now a settled rule in equity that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may by her contracts bind such separate estate. (2 Kent's Com. 164; *Jacques v. M. E. Church*, 17 John. 548; 20 N. Y. 247; 2 Edwards' Ch. 635.)

Whenever the entanglement of rights caused by the marriage have been avoided and the wife's property secured to her separate use, a complete right to dispose of or contract in regard to it is accorded her. (*Van Allen v. Humphrey & Gilbert*, 15 Barb. S. C. 556; 2 Bacon Abr. 71, title "M.;" 2 Bright. H. and W. 60.)

The Donation Act gives to the wife of a settler under certain circumstances a half section of land, "to be held by her in her own right." This right she cannot have if the land is subject to the marital rights of the husband as they existed at common law. (*Imlay v. Huntington*, 20 Conn. 149.) If it is her separate property, she must be deemed to have the *jus disponendi*. (*Hulme v. Tenant*, 1 Leading Cas. in Eq. 533; *Greenough v. Wiggington and Wife*, 2 Green, Iowa R. 435; *Sherman v. Elder*, 24 N. Y. 384; *Yale v. Dederer*, 18 N. Y. 271; 22 N. Y. 452.)

The Act concerning conveyances does not incapacitate a married woman from conveying her separate property. It merely provides a *mode* by which the wife shall convey her real estate, and it also provides a mode by which real property shall be conveyed generally. (Mis. Laws, ch. 6, §§ 1, 2.) Unless the formalities required by the Act are observed, the title will not pass in either instance. (*Lessee of Patterson v. Pease*, 5 Ohio, 190.)

Courts of equity disregard the wholesome provisions of the Statute of Frauds when one party seeks to avail himself of them to practice a fraud upon another. (*Cayon v. Dox*, 34 N. Y. 307.)

A married woman should not be allowed to plead her coverture where the transaction relates to her separate property is fair, and would operate unjustly if not carried

into execution. (*Graham v. Meek*, 1 Ogn. 325; *Fulton v. Moore*, 25 Penn. 468.)

Time was not the essence of the contract. (*Seton v. Slade*, 3 Lead. Cas. in Eq.; *Waters v. Travis*, 9 John. 466; *Calmes v. Buch*, 4 Bibb. 453; *Farley v. Vaughn*, 11 Cal. 227.) Respondents could not complain of delay when they had not tendered a deed. (*Beecher v. Conrath*, 13 N. Y. 108.)

J. H. Reed, for Respondents.

A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried, but the wife shall not be bound by any covenant contained in the deed. (Mis. Laws, ch. 6, § 2.) The bond of a *feme covert* is void. (Bac. Ab., title, "Baron and Feme," 1.) A *feme covert* cannot bind herself by an executory contract to convey her own lands, even though the husband join with her in the obligation. (3 Green. 50.) Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate. The agreement by a *feme covert*, with the assent of her husband, for the sale of her real estate, is absolutely void at law, and the Courts of equity never enforce such a contract against her. (2 Kent Com. 168.)

A party cannot compel the specific performance of a contract to convey lands, unless he shows that he has specifically performed on his part. (Story Eq. Jur., § 771; 4 Scammon, 266; 3 Gillinan, 483; 2 Ogn. 93.)

By the Court, BONHAM, J.:

Two questions are presented by the record in this case.

First. Can a married woman in any event be held liable under her covenant, entered into during coverture, to convey real estate held by her in her own right?

Second. Upon the failure or refusal of such married woman to convey her lands under such covenant, may the aid of a Court of equity be invoked to compel money advanced on the purchase-price, and value of permanent improvements made on the premises, to be refunded?

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In support of the first proposition, it is claimed by counsel for appellant, that the right of a married woman to hold real estate in her own right carries with it as a necessary incident the power of alienation.

If there is any plausible theory in support of such right in this State, its origin must be traced to this principle; for it is not derived from the common law, nor is it expressly authorized by any statutory provision. The doctrine that the right to alienate property results from the right to hold it, is maintained in general terms by good authority. (4 Kent's Com. 441.)

But it will be observed by a perusal of the authority above cited in support of appellant's position, that the author is discussing in general terms the grounds on which the right to alienate property is based, without any special reference to the rights of married women as a class. And when this author comes to speak directly of the rights of married women over their real property (2 Kent, 168), he says: "Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate. The agreement by a *feme covert*, with the assent of her husband, for a sale of her real estate, is absolutely void at law, and the Courts of equity never enforce such a contract against her. In the execution of a fine or other conveyance, the wife is privately examined, whether she act freely, and without such examination the act is invalid. But a covenant to convey is made without any examination; and to hold the wife bound by it would be contrary to first principles on this subject, for the wife is deemed incompetent to make a contract unless it be in her character of trustee, and when she does not possess any beneficial interest in her own right."

This principle, as enunciated by Mr. Kent, although in one sense a disability, was not intended as a limitation of the rights of married women; but it was adopted for their protection and benefit.

Notwithstanding the doctrine which is so zealously promulgated by some (and which in some respects it is to be feared may be somewhat utopian in character), claiming an

enlargement of the rights of women, yet it is the generally received opinion that the sphere of married women's duties, as they have been heretofore generally recognized and acquiesced in, precludes the means of acquiring by them that knowledge of law and commercial transactions necessary to enable them, as a rule, to safely and understandingly enter into covenants concerning their real estate. The provision of our statute exempting married women from liability under their covenants in a deed must have had its origin, partly, at least, in this idea. (Mis. Laws, ch. 6, § 2.)

But, be this as it may, it will not be controverted that, at common law, married women are not only held incompetent to enter into covenants to convey their real estate, but they are classified with those who are under disability to make any contract whatever; because the legal entity of the wife was held to be merged in that of the husband. And whether this disability of the common law, as applicable to married women, is calculated to operate beneficially to them, or otherwise, is not the real question to be addressed to the Court in this case. The question to be determined is: What is the actual legal status of married women, as applicable to this case, under the law on that subject as it now exists?

The terms of the grant by which this property was acquired by Mrs. Wheeler, simply provide that it is to be *held* by her in her own right. (§ 4, Donation Law.) No provision is made in the Act referred to for the voluntary alienation of the wife's land acquired under it, other than "by testament duly and properly executed, according to the laws of Oregon." (§ 4, Donation Law.) Section 2, ch. 6, Miscellaneous Laws, reads: "A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried; but the wife shall not be bound by any covenant contained in such deed."

This statute provides the manner in which the wife may convey her real estate, and we think by implication excludes every other manner except by devise. The manner as well

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as the capacity to alienate lands is conventional, and is not a natural or inherent right. Because a married woman is allowed by law to hold lands in her own right, she would not be tolerated in conveying the same to others without any regard to the local laws on that subject.

It would not be seriously contended as a matter of practice, that under our law a person might, if he chose to do so, convey his land by the ancient mode of livery of seizin. Nor would it be claimed that a married woman might, if she chose, go into Court and revive the ancient practice of alienation by fine.

We do not think it was the intention of the framers of our Constitution and laws on this subject, to entirely segregate the proprietary interests of husband and wife and make them to all intents and purposes *two* instead of *one* in law. But on the other hand, might it not be fairly inferred from the language of the law and its contemporaneous history, that the prime object and controlling purpose was, to secure to the wife the right to *hold* such property as the means of the support of herself and family in the event that her legal protector and provider might fail, through misfortune, improvidence or death, to do so?

It is also claimed by appellant that "it is a settled rule in equity that a *feme covert* in regard to her separate property is considered as a *feme sole*," and that she may dispose of the same as such. In support of this position, 2 Kent's Com. 164, and *Jacques v. M. E. Church* (17 Johns. 548) and other authorities are cited. But by a little further examination of the authority first cited (2 Kent's Com. 165-6) it will be observed that Mr. Kent qualifies his language at page 164 by saying: "A *feme covert* with respect to her separate property is to be considered a *feme sole sub modo* only, or to the extent of the power clearly given her by the marriage settlement. Her power of disposition is to be exercised according to the mode prescribed in the deed or will under which she becomes entitled to the property; and if she has a power of appointment by will, she cannot appoint by deed; and if by deed, she cannot dispose of the property by a parol gift or contract." And in the same

connection the case of *Jacques v. M. E. Church* is carefully reviewed and its correctness questioned. (6 Wend. 10.)

The respondent, Mrs. Wheeler, in this case derived her title to the land in controversy from the Donation Law referred to; and when the same is conveyed away by her it must be done in strict pursuance of the provisions of the statute on that subject. (*Carter v. Chapman*, 2 Ogn. 93.) We are clearly of the opinion that, under our law as it now stands, Mrs. Wheeler is not bound by the terms of her covenant entered into with appellant, and that his prayer for a decree of specific performance under it cannot be granted.

The second proposition in this case involves the consideration of the question whether appellant is entitled to the alternative relief prayed for in complaint. The law exempting a married woman from liability on her covenants to convey her real estate, was adopted for her better security and protection; and we do not think that it would be equitable, or in harmony with public policy and good morals, for Courts of equity, in protecting the rights of persons, to encourage the perpetration of an actual fraud by them.

We think that the allegations of the complaint in this case, which, standing upon demurrer, are to be taken as confessed, warrant an implied assumpsit, at least, against Mrs. Wheeler for the value of the permanent improvements made upon her premises by appellant. And we think that the twenty dollars in money which was advanced to Mrs. Wheeler on account of her land, and the value of the permanent improvements made on the same (less the value of the use of the premises, if any), should be decreed to be a charge on said land until paid. (37 N. Y. 35 and cases there cited.)

It is therefore ordered and adjudged that the decree of the Court below be modified in accordance with these views; and that this cause be remanded to such Court for further proceedings, according to law.

Decree modified.

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STATE OF OREGON, RESPONDENT, v. J. B. SPORES,
APPELLANT.

RECEIVING VERDICT.—It is error to receive the verdict of a jury in the absence of the defendant where the crime charged is a felony.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

John Kelsay, J. F. Watson and W. R. Willis, for Appellant.

John Burnett and R. S. Strahan, for Respondent.

By the Court, PRIM, C. J.:

Appellant was indicted for the crime of willfully and knowingly altering and defacing the artificial earmarks of sheep, the property of another, and converting them to his own use, under § 556 of the Criminal Code. The jury returned a verdict of guilty as charged in the indictment. When the verdict of the jury was returned into Court the defendant was not present and was not called. It was received by the Court and ordered to be entered of record in the absence of defendant and the jury discharged. He was on bail at the time and had been present during the trial up to that time. Two days afterwards, when he was called up for sentence, and asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, he replied that he objected on the ground that the verdict of the jury was received by the Court when he was not personally present. Notwithstanding the objection, the Court proceeded to sentence him to imprisonment in the penitentiary for one year, to which his counsel then and there excepted.

The only question presented by this appeal is whether it was error in the Court below to receive the verdict of the jury without the defendant being personally present. Section 144 of the Criminal Code provides that "if the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if

it be for felony, he must be present in *person*." There are other sections, one of which provides that he must be present at the arraignment and at the time of sentence.

As the crime for which appellant was convicted was a felony under the Criminal Code, it is admitted by counsel for the State that he must be present at the trial; but it is insisted by them that the receiving of the verdict is no part of the trial. Then the question must turn upon the point whether the receiving of the verdict is a part of the trial, or does the trial end when the Court submits the case to the jury for verdict?

Section 175 of the Civil Code defines a trial to be "the judicial examination of the issues of fact between the parties." Burrell's Law Dictionary defines a trial to be "the examination and decision of an issue of fact by the jury under the supervision of the Court." Stephens on Pleadings, 76, calls it the "*decision* of an issue of fact." 3 Bl. Com., page 330, says: "Trial has been long used to express the investigation and decision of fact only." The Code further provides that the defendant may be present when the verdict is returned, and may poll the jury by asking each one of them as his name is called whether that is his verdict.

Then we conclude that the "trial" not only includes the examination of the issues of fact between the State and defendant, but that it includes the decision of those issues of fact also, which decision is made known by the announcement of the verdict of the jury; and as appellant was prevented from exercising the right which the law gives him of polling the jury, we hold that it was error in the Court below to receive the verdict in his absence.

Therefore the judgment of the Court below is reversed, and a new trial awarded the appellant.

Argument for Appellants.

STATE OF OREGON, RESPONDENT, *v.* THOMAS
DOUGHERTY, RICHARD FLEMING AND SAMUEL
NEVILLS, APPELLANTS.

INDICTMENT.—It is not the intention of the Code to abolish or dispense with any of the essential requirements of an indictment as sanctioned by the wisdom and experience of the past and determined by the well-established rules of sound reason. None of the substantial elements of a good indictment as tested by the long-established principles of criminal jurisprudence are ignored by our statute.

IDEM—DESCRIPTION OF ACTS CONSTITUTING THE CRIME.—The indictment should contain such a specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the Court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law.

APPEAL from Multnomah County.

The appellants were indicted for setting up and managing a lottery for money. The indictment was in these words: "Thomas Dougherty, Richard Fleming and Samuel Nevills are accused by the Grand Jury of the county of Multnomah, by this indictment, of the crime of aiding and being concerned in setting up and managing a lottery for money, committed as follows: The said Thomas Dougherty, Richard Fleming and Samuel Nevills, on the 9th day of January, 1871, in the county of Multnomah and State of Oregon, did unlawfully and feloniously aid and were concerned in setting up a lottery for money contrary to the statute," etc.

Dougherty and Nevills, by their attorney, demurred to the indictment on the ground that the particular acts constituting the alleged crime were not set forth. The demurrer was not sustained. Nevills pleaded not guilty and demanded a separate trial. He was convicted and sentenced to pay a fine of two hundred dollars, from which judgment he appeals.

It was shown by the testimony that the game in question was decided by throwing dice—certain numbers when thrown drawing prizes.

Theodore Burmester, for Appellants.

The indictment contains no statement of the acts consti-

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tuting the alleged offense. The Code has merely simplified the forms of pleading. It has not abolished common sense and destroyed rules that have aptly been termed "the matured wisdom of ages." The demurrer should have been sustained. (Crim. Code, §§ 69, 70, 71, 72; *United States v. Howard*, 1 Sawyer R. 507; *People v. Taylor*, 3 Denio, 91; *People v. Allen*, 5 Denio, 76; Wharton's Prec. 836.) The word "lottery" is not defined by law. It must be construed in the indictment in its usual acceptation. (Code, 350, § 78.) In its best and most frequent application it describes those games of chance which are conducted under the supervision or guaranty of the government and the proceeds of which are devoted to public objects. (New Am. Encyclopedia, 664; Archibald Crim. P. & P. 1000.)

Lotteries have acquired a political importance not attained by any other species of gaming, and there is no comparison, so far as the effect upon the community is concerned, between them and ordinary games of chance. (*Phalen v. Virginia*, 8 How. S. C. 167.) The enactment of a general law against all kinds of gaming, and in which games played with dice are particularly enumerated and prohibited (Crim. Code, ch. 9) would be unnecessary if the word "lottery" includes all schemes which chance alone determines.

Gibbs & Upton, for Respondent.

The legal and popular meaning of the word "lottery" coincides. It has no technical or peculiar significance. (Abbott, U. S. Rep. 278.) It is defined to be a distribution of prizes and blanks by chance—a kind of game of hazard. (Worcester's Dic.; Webster's Dic.; Bouvier's Law Dic.; Rees' Cyclopaedia; Am. Encyclopedia; Smith's Wealth of Nations, B. 1, C. 10; *U. S. v. Olney*, 1 Abbott U. S. R. 279; 13 Barb. N. Y. 577; 7 N. Y. 228; *Bell v. State*, 5 Sneed, 505; 2 Bishop Cr. Law, § 946; 3 Seld. 237; 3 Denio, 88; 2 Mill. 128.) Within the meaning of our statute a raffle and lottery are one and the same thing.

By the Court, BONHAM, J.:

Although the question was not argued upon appeal, yet

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the transcript in this case fails to disclose what disposition was made of the demurrer filed herein; which would be error in the Court below, if the record of proceedings in that Court are complete in the transcript, unless the objections raised by the demurrer were of such character that they would be waived by pleading over. (*Willamette Falls Co. v. David Smith et al.*, 1 Oregon R. 181.)

In the assignment of errors in this case, two principal questions are presented, and, in the argument of counsel for appellant, urged upon the consideration of this Court:

1. Is the indictment defective and insufficient for uncertainty, in that it does not set out the *acts* and *circumstances* constituting the offense charged?

2. Is the game or scheme which appellant was charged with "aiding and being concerned in setting up" (as disclosed by testimony in bill of exceptions) a lottery within the spirit and meaning of the Constitution and laws of this State?

For the purposes of this case, we deem it unnecessary to consider any of the questions raised, other than those embraced in the first proposition.

It is a provision of our fundamental law that, "in all criminal prosecutions the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel, to demand the *nature and cause* of the accusation against him," etc. (§ 11, Bill of Rights.) Auxiliary to the above constitutional provision, it is further provided by legislative enactment that in criminal actions the indictment *must* contain, "a statement of the *acts* constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Crim. Code, § 69.)

While it clearly appears to have been the purpose of our Legislature to simplify the old common law system of criminal jurisprudence, by divesting it of many of its technical requirements, such as do not appear to affect the substantial rights of the accused, yet we do not think that it

was ever intended to abolish or dispense with any of the essential requirements of an indictment as sanctioned by the wisdom and experience of the past, and as judged and determined by the well-established rules of good reason. In our practice in *civil* cases, a pleading is insufficient and subject to demurrer if the pleader alleges conclusions of law instead of the facts from which such conclusions may be deduced.

Measured by the rules and requirements above presented, is the indictment in this case sufficient to warrant the State in arraigning the defendants and placing them upon trial for a crime? By the provisions of our Constitution the accused is entitled "to demand the *nature* and *cause* of the accusation against him," before he can lawfully be called upon to answer thereto.

By a careful analysis of the language above quoted, we find that Webster defines "nature" to mean, "the sum of qualities and attributes which make a thing what it is, as distinct from others." The same author defines "cause" to mean, "that which produces or effects a result; that from which anything proceeds and without which it would not exist." And inasmuch as an effect cannot exist without a cause, neither do we think, as a rule, that a good indictment can exist without a statement of the essential acts and circumstances which are the cause of the alleged crime or result.

The attributes and elements of the accusation or crime, whenever it is possible to do so, should be set out in the indictment, and the accused is entitled to be informed of the same by a copy of the indictment, and not be compelled to wait until the State introduces testimony to develop the acts and circumstances which are necessary to the identity of the particular crime charged. The reasons for the above requirements are apparent, and need no extended argument in their support. Chief Justice Bronson, in speaking of the indictment in a case like this (*People v. Taylor*, 3 Denio, 91), says: "It is a general rule that there should be such certainty of description as will identify the offense, so that the party may not be indicted for one thing

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and tried for another; certainty is also required, to the end that the defendant may know what crime he is called upon to answer, that the jury may be able to deliver an intelligible verdict and the Court to render the proper judgment; and finally, that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offense." Judge Bronson, however, very properly further remarks: "But this rule must not be carried so far as to furnish a shield from punishment where it is plain that a crime has been committed; and, therefore, the indicting jurors are allowed to state that a particular fact not vital to the accusation is to them unknown."

Under the provisions of the section of our statute before referred to, prohibiting lotteries, there is special reason for particularity and certainty in the indictment so far as "the nature and cause of the accusation" are concerned, for the reason that the lawmaker has conferred great latitude upon the Courts in imposing the penalty for the violation of such law; the punishment ranging all the way from a fine of one hundred dollars to imprisonment in the penitentiary. It was evidently the object of the Legislature to embrace within the purview of this section all the multifarious lottery schemes in vogue, from the most magnificent, and therefore most dangerous to the welfare of society, down to the most trifling in character and results. It is with this view evidently that the penalty is graded as we find it; and where such is the case it becomes the more important to disclose in the indictment (for the reasons already stated) the nature of the particular transaction complained of.

In fact the case at bar exemplifies the necessity of the observance of the rules above stated. The indictment charges the defendants with "aiding and being concerned in setting up a lottery for *money*," whereas the evidence in the case as disclosed in the bill of exceptions shows, that if a lottery at all, it was more a lottery for property, inasmuch as, of the forty-one prizes for distribution, there was but one of money.

Although it has sometimes been claimed by members of the profession, that by our Code of Criminal Procedure no

particular skill or precision was required in framing an indictment, and that almost any form of words would be sufficient, yet we fail to see that any of the substantial elements of a good and sufficient indictment, as tested by the long and well-established principles of criminal jurisprudence, are ignored by our statute. In addition to the constitutional and statutory requirements already referred to, it is furthermore provided (Crim. Code, § 72) that “the indictment must be *direct* and *certain* as to the crime charged, and the particular *circumstances* of the crime charged, when they are necessary to constitute a complete crime.” We think that, under our Code, whenever it is practicable, the indictment should contain such *specification of acts* and *descriptive circumstances* as will, upon its face, fix and determine the identity of the offense, and enable the Court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law.

By the language of this indictment it is not possible to determine what particular unlawful act, or lottery transaction, or scheme, the defendants are charged with “aiding and being concerned in setting up.” The defendants in this case might, at the time and place charged, have been engaged in half a dozen of the almost innumerable lottery schemes, from the magnificent “gift concert,” in which hundreds of thousands of dollars are promised to be distributed, down to the little fifty-cent game for the sale or distribution of trinkets; and yet, from the language of this indictment, they are not furnished with the slightest intimation of what particular transaction or scheme they are charged with having aided or been concerned in setting up. By what *act* did they aid and in what *manner* were they engaged in setting up the forbidden scheme? What was the *nature* of the lottery scheme referred to? The language of the indictment answers none of these questions. How could the defendants, with any certainty, prepare for their defense? They might be prepared to defend against one transaction, while the State came into court prepared to prosecute them on another and entirely different one. Good

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pleading in either criminal or civil proceedings does not subject the litigant to such uncertainty, annoyance and unnecessary expense.

Judging this indictment by the reasons, and measuring its sufficiency by the rules above stated, we think the Court below erred in not sustaining defendants' demurrer.

Judgment reversed.

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J. B. SHEPHERD, RESPONDENT, v. IRA HAWLEY,
APPELLANT.

ESTRAY ANIMAL.—Our statute does not define an estray, but merely provides where, when, and how they may be posted. An estray is an animal that has escaped from its owner, and wanders or strays about—usually defined at common law as a wandering animal whose owner is unknown. An animal cannot be an estray when on the range where it was raised, and permitted by its owner to run, and especially when the owner is known to the party who takes it up. The fact of his being breachy or vicious has reference only as to when he may be taken up.

IDEM—WHEN MAY BE TAKEN UP.—An animal to be taken up and posted as an estray in the months of August and September, must be not only an estray, but either breachy or vicious.

APPEAL from Lane County.

The facts are stated in the opinion of the Court.

John Burnett and John Kelsay, for Appellant.

J. F. Watson, and Hill, Thayer & Williams, for Respondent.

By the Court, PRIM, C. J.:

This action was commenced by respondent to recover the possession of a bull, which he claims was taken from him by appellant about the 26th of August, 1870, under pretense of posting him as an estray.

It is claimed in the answer that the animal was both breachy and vicious, and was taken up and posted as an estray. The bill of exceptions develops the following facts: that appellant was a householder, and that he and respondent resided in the same neighborhood; that the animal in

question was breachy and vicious, and had been running at large about the premises of appellant for two months prior to the time when he was taken up; that appellant knew the animal in question was owned by respondent when he took him up.

At the trial in the Court below, the jury were instructed as follows: "If you find from the evidence that the bull in question was raised in that neighborhood, and upon that range, and Hawley knew to whom he belonged, and found him running at large on that range where he was raised, then he was not an estray.

"In order to authorize an individual to take up an estray, he must be a householder, and the owner of the estray must be unknown to him, or the animal must be off the range where he was permitted to run by his owner. An animal cannot be an estray when on the range where he was raised and permitted to run, and especially where the owner is known to the party who takes him up. The fact of being breachy or vicious has reference only as to when he may be taken up. That in order to enable defendant to take up an animal in the months of August or September, you must find not only that the animal was an estray, but that it was breachy or vicious. An animal running in its usual range where its owner lives, and where he is known by the person taking it up to exercise supervision and control over it, is not an estray, even though it is not confined in an enclosure."

It is claimed by counsel for appellant that these instructions of the Court were erroneous. Our statute provides that "any householder, about whose premises any estray may be in the habit of running at large, may take up the same, etc.; * * * *provided*, that no estray shall be taken in the months of May, June, July, August, September, October and November, except breachy or vicious animals, which may be taken up in any month." (Mis. Laws, ch. 18, § 2.)

The statute does not define an estray, but merely provides who may take up and post them—how it shall be done and when—that is, during what months it may be

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done. The person taking up and posting must be a householder, and the estray must be in the "habit of running at large about his premises." It can be done only between the months of November and May, "except breachy or vicious animals, which may be taken up in any month." Under this exception in the proviso of section two, it is claimed, on behalf of appellant, that any breachy or vicious animal running at large about the premises of a householder, may be taken up and posted during any month, although the owner of such animal may be well known to the person taking it up. On this proposition, we think the Court below properly held that the fact of an animal being breachy or vicious, has reference only as to when it may be taken up. In other words, to authorize the posting of an animal during the excepted months, it must be not only breachy or vicious, but an estray as well. An estray is defined by Burrell's Law Dictionary to be "an animal that has escaped from its owner and wanders or strays about." This author says, it is usually defined "as a wandering animal whose owner is unknown." (2 Kent, 351; 1 Bl. 297, 298.) According to this definition, an animal running on the range where it was raised, or where it was permitted to run by its owner, could not be considered an estray; because, in so doing, it could not be considered as having escaped or wandered away from its owner; and especially where, as in this case, the owner was known to the person taking it up.

A number of other instructions were asked by appellant, and refused by the Court, which we deem unnecessary to notice, as they were merely the converse of those given by the Court.

There being no error in the instructions and proceedings of the Court below, the judgment is affirmed.

Statement of Facts.

DELIA B. LEWIS, RESPONDENT, v. DAVID R. LEWIS,
APPELLANT.

NOTICE OF APPEAL.—The notice of appeal from a decree need not specify the grounds of error.

SUFFICIENCY OF SURETIES.—Exception to the sufficiency of sureties to an undertaking on appeal must be made within five days from the filing of the undertaking.

APPEAL from Polk County. .

This is a suit in equity. Defendant appeals from the decree entered in the Court below. The notice of appeal is as follows: "Notice is hereby given to said plaintiff and her attorneys of record, Sullivan and McCain, that defendant appeals from the decree of said Circuit Court, rendered on the first day of May, 1871, in favor of said plaintiff and against said defendant, for the recovery and possession of about eighteen acres of land described in said decree, to the Supreme Court of said State, at the next regular term thereof, on the first Monday of September, 1871; said defendant, D. R. Lewis, assigns error in the said decree and therefore appeals from the whole thereof." This notice was duly served on May 15, 1871. The undertaking on appeal was filed on May 17, 1871. On May 30, 1871, the plaintiff caused to be served upon the defendant a notice of exception to the sufficiency of the sureties on said undertaking. The sureties failed and refused to justify,—and now the respondent files her motion to dismiss the appeal for the reasons:

"First. That notice of appeal served in said suit is insufficient; it does not intelligibly refer to the judgment or decree rendered.

"Second. There is no undertaking filed, such as the law requires, for the reason that the sureties refuse to justify as required by the statute in such case made and provided."

Sullivan & Thompson, for the motion.

C. G. Curl, J. A. Applegate and P. C. Sullivan, contra.

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Points decided.

By the Court, McARTHUR, J.:

Upon the first point presented, we are of opinion that a notice of appeal which sets forth with reasonable certainty the decree appealed from, the Court in which the decree was rendered, the time when rendered, the names of the parties and the fact that one party or the other intends to appeal therefrom to the Supreme Court, is a sufficient notice in a suit in equity. If a party desires to appeal from a judgment in an action at law the grounds of error must be *specified*, but by reason of Subdivision 1, § 527 of the Civil Code it is otherwise when an appeal is taken from a decree in a suit in equity.

This being an appeal from a decree, we deem the notice of appeal sufficient.

The second point depends upon the construction of Subdivision 2 of § 527 (Laws 1870), which reads as follows: "Within ten days from the service of appeal, the appellant shall file with the Clerk an undertaking, as hereinafter provided. Within five days thereafter the adverse party shall except to the sufficiency of the sureties in the undertaking or he shall be deemed to have waived his right thereto." We are of opinion that the word "thereafter," used in said subdivision, refers to the time when the undertaking is filed. Exceptions, therefore, to the sufficiency of the sureties on the undertaking on appeal must be made within five days from the filing of the undertaking.

Hence the motion is denied.

W. J. ROBERTSON, RESPONDENT, *v.* WM. GROVES
AND THE CITY OF CORVALLIS, APPELLANTS.

JURISDICTION OF MUNICIPAL CORPORATIONS TO TRY QUESTIONS OF CONTEST FOR MUNICIPAL OFFICE.—The city of Corvallis is not invested by its charter with authority to hear and determine a contest for a city office. The right to try a contest for a municipal office does not follow by necessary implication from the right to provide for the election of city officers. Neither does such right follow from the general authority to provide by laws and ordinances, not inconsistent with the laws of the United States or of this State, to carry into effect the provisions of its charter.

CONSTRUCTION.—The statutes creating municipal corporations are to be strictly construed against such corporation.

Argument for Respondent.

APPEAL from Benton County.

At an election for city officers, held in the city of Corvallis on the first Monday in May, 1871, Robertson and Groves were competing candidates for the office of City Recorder. Robertson was declared elected and a certificate of election was issued to him, under which he qualified and entered upon the discharge of the duties of the office. Thereafter Groves applied to the Common Council for leave to contest Robertson's election, which was granted, and a committee appointed to conduct the trial. The contest was determined in favor of Groves. Thereupon Robertson instituted proceedings by writ of review to reverse the decision of the Common Council, on the ground that the charter of the city did not authorize its proceedings. The Court below set aside the proceedings of the Council, and from this order of the Court an appeal is taken.

John Kelsay and F. A. Chenoweth, for Appellants.

The object of municipal governments is to enable them to legislate on all matters within their limits according to their own tastes and wants. (Title of Act of 1857 incorporating City of Corvallis.)

The right to provide for the election, etc., of city officers carries with it the right to provide for a contest. (5 Hill, 211; 27 N. Y. 514; 2 Story on Con., § 1907.)

There is no law in this State in conflict with the ordinance under which the contest was had.

There must in the nature of the case be many implied powers given to a city government. Courts have always so held. (15 Barb. N. Y. 193; Edwards on B. & N. 75; 5 Barb. N. Y. 43; 7 Cranch, 299; 3 McLean, 393; 4 Pet. 152; 1 McLean, 41; 9 How. 172; 4 Wheat. 518, 636; 5 McLean, 194; 4 Pet. 514; 28 Barb. N. Y. 65, 560; 25 Id. 146; 12 Id. 559.)

R. S. Strahan and John Burnett, for Respondent.

Whatever is not expressly granted in acts of incorporation is taken to have been withheld; and all acts of incor-

Opinion of the Court—Bonham, J.

poration are taken most strongly against the corporation. (Sedgwick Const. Law, 338, 339, 341, 342, 466; 11 Peters, U. S. 420; 4 Peters, 152, 168, 514; 13 Cal. 580; 18 Cal. 643; *Dalles Manufacturing Co. v. Dalles Lumbering Co.*, 3 Ogn. 527; 2 Met. R. 220; 4 Gray R. 107; 1 Ogn. 218; 18 Cal. 643; 13 Cal. 580.) Under the Code the writ of review issues to any inferior Court, officer or tribunal. (Civ. Code, § 573; 2 Ogn. 35, 298.) It extends not only to inferior Courts but to persons invested with power to decide on the property rights of individuals, even in cases where they are authorized by statute finally to hear and determine, if the jurisdiction be not taken away by express words. (2 Cal. R. 179; 20 Johns. R. 430; Id. 80; 16 Id. 8; 23 Wend. 277.) A void proceeding can be cancelled by this writ. (24 Wend. 249; 16 Johns. R. 49; 22 Wend. 132.)

By the Court, BONHAM, J.:

The material, and really the only question in this case, is one of jurisdiction. Has the Common Council of the city of Corvallis authority, under its charter and the ordinances passed in pursuance thereof, to hear and determine contests for city offices?

It is not claimed by the appellants that the Legislative Assembly has ever directly or expressly conferred such authority upon the city of Corvallis, but they do claim that by necessary implication the city authorities possess such right. And whether that position be correct is the question which we are called upon to decide.

In the Act incorporating the city of Corvallis (Act of January 28, 1857, § 6), amongst the powers enumerated as conferred upon the Common Council, it is provided that they shall have exclusive power "to provide for the election and qualification of officers and for filling vacancies in office." It is also provided in the same section of said Act that the Common Council shall have authority "to make by-laws and ordinances not inconsistent with the laws of the United States or the Territory, to carry into effect the provisions of this charter," etc. And it is presumed that it was under these provisions that the city authorities assumed to pro-

vide by ordinance the mode of proceeding to determine contests for city offices. And it is by virtue of these provisions of the Act referred to that appellants claim the authority to proceed in the manner they have done in this case.

The exercise of the authority claimed by the city of Corvallis is a judicial act. Sec. 1 of Art. VII of our State Constitution provides that "the judicial power of the State shall be vested in a Supreme Court, Circuit Courts and County Courts, which shall be Courts of record having general jurisdiction, to be defined, limited and regulated by law in accordance with this Constitution. Justices of the Peace may also be invested with limited judicial powers, and municipal Courts may be created to administer the regulations of incorporated towns and cities."

Sec. 9 of the same Article also declares that "all judicial power, authority and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court, shall belong to the Circuit Courts, and they shall have appellate jurisdiction and supervisory control over the County Courts and all other inferior Courts, officers and tribunals."

The jurisdiction, then, of all municipal Courts created for the government of towns and cities is only such as has been clearly delegated, defined and limited by legislative enactment; and the well-established rules of the strict construction of the powers of such tribunals apply.

In the Act incorporating the city of Corvallis, certain powers are specifically enumerated as legitimately belonging to the city authorities, and those powers which are not thus enumerated, and which are not *absolutely necessary* to the enjoyment of such enumerated powers, are to be taken to have been withheld. In cases like this, and in fact in all conceivable cases of like character, jurisdiction is conferred upon the Circuit Courts to determine the same.

Sec. 354 of our Civil Code declares that an action at law may be maintained, etc., "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any

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office in a corporation, either public or private, created or formed by or under the authority of this State."

If there were no general provision of law for determining a contest for a municipal office, there would then be more reason for claiming that the charter of the city of Corvallis conferred that right upon the Common Council by necessary implication. But ample provision has at all times been provided by general laws, Territorial as well as State, for the determination of questions of this character. As a matter of public policy, there can be no good reason for providing a great number of Courts with concurrent jurisdiction, or a great number of concurrent remedies for the adjudication of cases like the one at bar. To do so is, to a greater or less extent, to mystify the avenues to public justice.

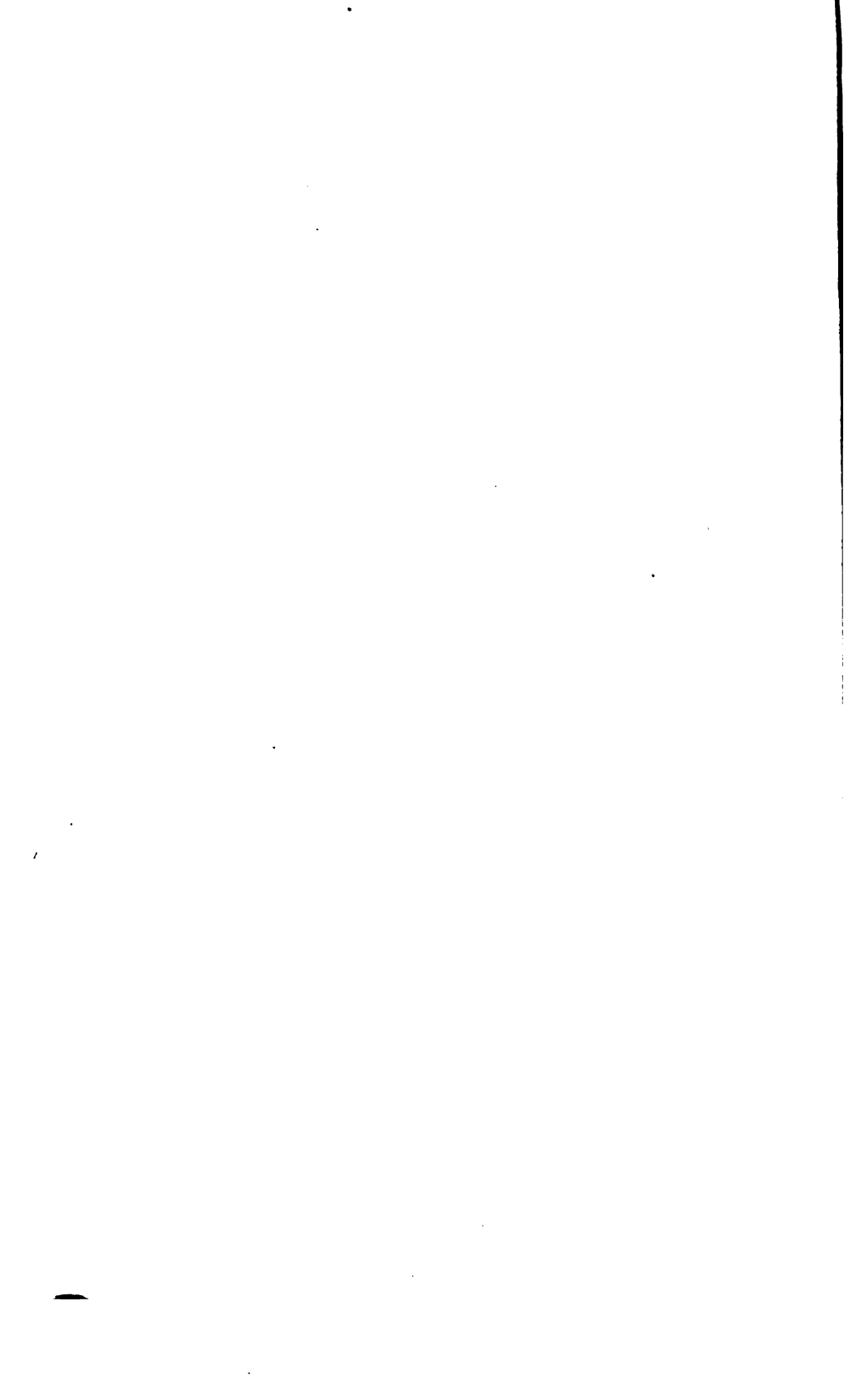
But the real question in this case is, whether the Legislature has ever conferred upon the authorities of the city of Corvallis jurisdiction to determine contests for city offices. Doubtless such authority might legitimately have been conferred. But we do not find language in the Act incorporating the city of Corvallis or in any of its amendments which in our judgment warrants the construction of the same, claimed by appellants. We think it the better rule, regarded upon principle as well as authority, that statutes creating municipal corporations should be strictly construed against such corporations. The people of a city, unlike those of a State, have no reserved rights as such, but all power and authority to maintain a municipal government within a city is delegated to it by the Legislature, either by express authority or *necessary* implication.

But the people of the State at large have a reserved right, if they choose to retain it, and a direct interest in the good government of all its incorporated towns and cities. And yet, while it is usual as a matter of public convenience to delegate to city authorities full power to regulate and control their local and domestic concerns, we do not think that the authority claimed by the city of Corvallis, in this instance, has been conferred upon it by the Legislature. Such power certainly has not been expressly

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delegated, and we do not think that it can be successfully maintained that it is derived by *necessary* implication from the authority before referred to, and through which appellants claim that it is deduced.

The judgment of the Court below is affirmed.



SEPTEMBER TERM, 1872.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

SEPTEMBER TERM, 1872.

JANE ROBERTS, RESPONDENT, v. FENDEL SUTHERLIN, APPELLANT.

MORTGAGEE IN POSSESSION.—A mortgagee who obtains possession of mortgaged premises with the assent of the mortgagor, after default of the latter, may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor so long as the mortgage debt remains unpaid.

ALLEGATION OF ASSIGNMENT.—The allegation, in complaint, that the mortgage in question “has been duly assigned and transferred to this defendant,” is a sufficient allegation of assignment. It is otherwise, however, where it appears that there is a note or other contract of indebtedness, independent of the mortgage. In the latter case the mortgage is the incident of the debt, and the transfer of the latter carries with it the former.

APPEAL from Douglas County.

This is an action of ejectment to recover the possession of premises to which plaintiff claims title in fee. The answer denies that plaintiff is entitled to the possession of the premises described, or that she is the owner in fee or otherwise, except as is further stated. The answer further alleges that defendant is the owner in fee of the premises,

4	219
7	335
10	332
18	147
22*	946
4	219
47	229
4	219
48	56

Argument for Appellant.

“subject to a right of redemption by said plaintiff, by virtue of a defeasance clause in a certain deed or mortgage executed by plaintiff and one Jesse Roberts, jointly, to one J. F. Sutherlin, on the 4th day of February, 1860, to secure payment of a certain sum of money, which mortgage has been duly assigned and transferred to this defendant, and upon which said mortgage there is now due and payable about the sum of four thousand dollars.” It is then alleged that defendant entered into possession of the premises with the full assent of plaintiff.

Plaintiff interposed a demurrer to the sufficiency of the answer, which was sustained, and defendant failing to further plead, judgment was rendered as prayed for in the complaint; from which defendant appeals.

L. F. Mosher and W. W. Thayer, for Appellant.

It has always been held that in the absence of any statutory provision to the contrary, a mortgagee could maintain ejectment against the mortgagor upon default in the payment of the mortgage debt. (Adams on Ejectment, 105; 10 Wall. U. S. 530.) The mortgagee has been permitted to maintain such action for the reason that the mortgagee in possession can always be made to account for the rents and profits and to apply them upon the debt and interest. (*Strange v. Allen*, 44 Ill. 428.) A mortgagee out of possession could apply in equity for the appointment of a receiver to secure the rents and profits which have not been collected. (*Astor v. Turner*, 11 Paige R. 436.)

Since the case of *Jackson v. Willard* (4 John. 41), in 1809, the Courts of the State of New York have, as a general rule, held that a mortgage was a mere security for a debt; and at the same time have held that a mortgagee, after default, was entitled to the possession of the mortgaged premises until the payment of the debt. (4 Kent, 174.) Before the Revised Statutes, he could maintain ejectment for the possession, and after that remedy was taken away, he could retain possession, if he could in any way acquire it, until the debt was paid. (*Pell v. Ulmar*, 18 N. Y. 142, and cases there cited; 42 Mo. 138; 44 Ill. 30; *Woods v. Helderbrand*, 46 Mo. 284, reported in 2 Am. R. 515; 4 Minn. 499; 14 Tex. 142.)

Argument for Respondent.

The deduction from this is that the right of the mortgagee to recover or retain the possession of the mortgaged premises does not depend upon the question as to whether the mortgage passes title to the freehold; but it is a right to recover or retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. (*Kortright v. Cady*, 21 N. Y. 364; *Dutton v. Warschauer*, 21 Cal. 625; *Pollock v. Mason*, 41 Ill. 516.)

If the mortgagee is lawfully in possession, after condition broken, he will not be turned out until his debt is paid (2 Black U. S. 579), and this is held even where the debt is barred by the Statute of Limitations. (*Reed v. Shipley*, 6 Vt. 602.)

Section 323 of the Civil Code, which provides that a mortgage shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession, does not change the rights of parties where the mortgagor assents to the mortgagee's taking possession. It simply took away a remedy which has been regarded as harsh and severe. (3 Am. Rep. 256.)

W. R. Willis and Watson & Lane, for Respondent.

The mortgagor in this State is the legal owner of the mortgaged premises, and is entitled to the possession of the same. (9 Cal. 365; 18 Cal. 482; 2 Washburn on Real Property, 550; 26 Ga. 197.)

In this State the mortgagee has no interest in the mortgaged premises, further than as a security for his debt; he is not entitled to the possession of the same, and must foreclose his mortgage and sell the premises before he can take possession of the same. (Civ. Code, § 323; *Anderson v. Baxter*, ante, p. 105; 17 Cal. 589; 22 Cal. 255, 266.)

Our statutes require the defendant in ejectment to plead his estate or interest in his answer with the same certainty as is required in the complaint. (Civ. Code, § 316; *Deady's R.* 104; 30 Cal. 685, 687.)

By the Court, BONHAM, J.:

The principal question presented in this case is, what is the legal effect of an entry made upon mortgaged premises by the mortgagee with the *assent* of the mortgagor? Is the possession thus acquired by the mortgagee lawful, and a good defense against an action of ejectment brought by the mortgagor? These questions, so far as we are advised, are new in this State.

The case of *Anderson v. Baxter*,* reported in Session Laws of 1870, page 265, is cited by respondent's counsel in support of their position on these questions; but on a careful examination of that case, as well as the manuscript opinion of this Court by Thayer, J., on appeal from a rehearing of the same cause, on amended complaint, in 1871, it will be observed that those cases do not determine the material questions involved in this.

In the first case of *Anderson v. Baxter* the only questions determined were, that a suit to foreclose a mortgage must be commenced within ten years from the time the cause of suit accrued; that the execution of a mortgage does not vest in the mortgagee any title to, or interest in, the mortgaged premises, but that it is only a security for a debt similar to that created by a judgment. It was also held in that case that the time of the absence of the mortgagor from the State should not be computed in the period of limitation for the commencement of the suit to foreclose the mortgage; and these are, substantially, the only questions determined in that case.

In the second case of *Anderson v. Baxter* determined by this Court and hereinbefore referred to, the plaintiff, to avoid the effect of the Statute of Limitations, applied to and obtained leave of the Court below for a rehearing upon his amended complaint, setting forth that Anderson, the assignee of the original mortgagee in that case, was then, and for a number of years prior thereto had been, in the *peaceable* possession of the mortgaged premises in question, and also that he (Anderson) had applied

**Ante*, p. 105.

Opinion of the Court—Bonham, J.

the rents and profits of the mortgaged premises so occupied by him to the partial payment of the mortgage debt, and thus sought to take his case out of the operation of the Statute of Limitations. This Court also held in that case that such an application of the rents and profits being without authority from the mortgagor, did not amount to a voluntary or authorized payment by him so as to effect the object sought by the plaintiff.

But in the case at bar the defendant Sutherlin avers in his answer that he entered into the possession of the mortgaged premises with the full *assent* of the plaintiff, the mortgagor.

It is true, that under our Code (Civ. Code, § 323) a mortgagor cannot against his will be divested of his possession of the mortgaged premises, even after default, without a foreclosure and sale. But we know of no law or of any good reason to prevent the mortgagor from placing his mortgagee in possession of mortgaged premises if he chooses to do so. Such proceeding would frequently operate beneficially to both parties by avoiding the expense of a foreclosure suit. And where the duration of the possession of the mortgagee thus acquired is not limited by his agreement with the mortgagor, we think that the legal effect of the same is, that he may retain it until his mortgage debt is paid. And we do not think that this doctrine conflicts with the rule that a mortgage is simply a security for a debt and vests in the mortgagee no legal title to or interest in the mortgaged premises. At all events, this doctrine is clearly maintained in a great number of well-authenticated cases in different States.

Judge Comstock, in *Kortright v. Cady* (21 N. Y. 365), in speaking of the modification of the common law rule on this subject, says: "When the Legislature, by express enactment, denied this remedy to mortgagees (the right to eject the mortgagor after condition broken), they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet, I see nothing inconsistent or anomalous in allowing the pos-

Opinion of the Court—Bonham, J.

session once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is as before in the mortgagor without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor or creditor, between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished it is neither just nor lawful for an instant longer."

The result of this construction of the law of mortgages is simply declaratory of the true doctrine that the people should not be unnecessarily trammled or restrained in their right to deal with their property according to their own judgment of what may be for their best interests. If a mortgagor chooses to retain the possession of his mortgaged premises until a foreclosure and sale, he may do so; if he thinks that his interests will be promoted by investing his mortgagee with possession before that time, he is bound by his act according to the terms and legal effect of his agreement. We think this is the correct doctrine upon principle as well as authority.

Respondent's counsel also object to the sufficiency of the answer, for the following further reasons, to wit: The defendant does not sufficiently deny that the plaintiff is the owner of the premises in dispute, and that there is not a sufficient allegation of the assignment of the mortgage in question to the defendant. These objections, we think, are not well taken. On the latter point, the defendant avers that the mortgage was duly assigned and transferred to him.

While it is true that where a note or bond exists independent of the mortgage, and which it is given to secure, the latter is regarded as the incident of the former, and such note or bond must be assigned to carry the mortgage. But in this case it does not appear that any such note or bond was given.

We think that defendant's answer, if true, constitutes a de-

Statement of Facts.

fense to plaintiff's cause of action, and that the Court below erred in sustaining the demurrer.

Judgment is reversed, and this cause remanded for further proceedings according to law.

FRANCIS S. MATHEWS, RESPONDENT, v. HIRAM
EDDY, APPELLANT.

DESCRIPTION IN DEED.—A clerical error in the description of a tract of land will not vitiate a deed where the intent of the parties can be ascertained with certainty from the instrument, when considered in connection with the situation of the parties and of the subject-matter.

JUDGMENT SALE OF MORTGAGED PREMISES.—Where a judgment was obtained in an action at law upon a promissory note, and a tract of land, which had been mortgaged to secure the note, was sold on the execution without foreclosure of the mortgage, and the sale had been confirmed: *Held*, that the sale is not void, and that it cannot be attacked collaterally.

ORDER CONFIRMING SHERIFF'S SALE.—An order of Court, confirming a Sheriff's sale on execution, may be regarded as a final adjudication touching the regularity of all proceedings taken in the execution of final process.

APPEAL from Polk County.

This was an action of ejectment to recover certain real property which each of the parties claimed to own in fee. The land in dispute is described in the pleadings as follows: "Beginning twenty chains north, and fourteen and thirteen one-hundredths chains west of the quarter-section corner-post on the east and west line, between sections 9 and 16, in township 9 south, range 4 west, and running thence west forty-five and eighty-seven one-hundredths chains; thence south forty-three and sixty one-hundredths chains; thence east forty-five and eighty-seven one-hundredths chains; thence north forty-three and sixty one-hundredths chains, to the place of beginning."

The cause was tried by the Court without the intervention of a jury.

On the trial, the plaintiff having shown title in his grantor, and introduced mesne conveyances from his grantor to himself, rested his case, and the defendant offered and read in evidence a judgment for money, rendered in the Circuit

4	225
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8	65
4	225
24	553
34	477

Argument for Appellant.

Court against the plaintiff's grantor, on execution issued to enforce the judgment, the Sheriff's return thereon of a sale of the premises to satisfy the judgment, and a Sheriff's deed executed in pursuance of the sale to one Marshall, under whom the defendant claims; all of which were received subject to the plaintiff's objection.

The Sheriff's return on the execution shows that only three notices of sale had been put up; that the property was sold at the court-house in Polk County, where the land was situated, and it contains the following recital, "There being occupant of the premises." The defendant offered to prove further that at the time of the levy and sale the plaintiff had no personal property and that no person was occupying the premises, but the Court refused to permit such proof.

The defendant also offered in evidence a deed from Marshall to the defendant in which the land conveyed is described the same as the tract in controversy, except that in describing the beginning of the boundary, the following words are used: "Beginning twenty north, fourteen and thirteen one-hundredths chains west of the quarter-section post," etc. This testimony was rejected.

In rebuttal, the plaintiff was allowed to prove that the note upon which the judgment was rendered, under which the execution sale to Marshall was had, was secured by a mortgage upon the premises in dispute and that such mortgage had not been foreclosed.

Judgment was rendered in favor of the respondent.

The other facts are stated in the opinion of the Court.

Benj. Hayden and Boise & Willis, for Appellant.

Plaintiff in an action of ejectment must recover on the strength of his own title. (Taylor on Ejectment, 63, 72, 577, 774.)

A recital of service in a judgment is conclusive as to service. (34 Cal. 391.)

The equity of redemption may be sold on execution to satisfy the mortgagee's debt without a foreclosure. (15 Ohio, 467; *Pierce v. Potter*, 7 Watts, 475; *Porter v. King*, 1 Green-

Argument for Respondent.

leaf, 297; 2 Johns. Ch. 130; 7 Paige, 438; 1 Hilliard on Mortgages, 417.)

R. S. Strahan, John Burnett and John Kelsay, for Respondent.

Notice of the sale on execution was required to be given by posting four notices. (Laws of Oregon of 1855, p. 124, § 20.)

The Sheriff who sells under a judgment and execution exercises a statutory power, by virtue of which alone his deed can operate upon the title to the land sold. (11 N. Y. 76; 7 Abb. Dig. 298; 35 Mo. 225.) The statute is imperative as to the notices, and no title can pass unless the law is strictly complied with. (20 Barb. N. Y. R. 149; 7 Conn. 229, 350; 5 Conn. 592; 42 Maine, 414; 13 Mass. 487; 5 Cow. R. 400; 7 Cow. R. 229.) Parol evidence will not be admitted to cure a defect or supply an omission in the officer's return. (2 Mass. 154; 7 Id. 388; 9 Id. 241; 13 Id. 487.)

A Sheriff's deed that does not recite the recovery of a judgment, the issuing of execution, and the posting up of notices of sale as required by law, is fatally defective. (24 Cal. 418; 25 Id. 230; 4 Pet. R. 88; 9 Curt. U. S. R. 8; 11 Wend. R. 436.) Nor is the plaintiff estopped by recitals in the deed. (1 Cal. Dig. 246, § 66.) A confirmation of the sale by the Court did not make the deed valid. (1 Cal. Dig. 250, § 114; 24 Cal. 585.)

A deed to be valid must be certain to a common intent, so that a surveyor can find the corners and trace the boundaries. If the description is illegible or unintelligible, the deed is inoperative. (18 Johns. R. 107; 13 Id. 97, 537; 10 N. Y. 509.)

An equity of redemption may be sold under legal process only in favor of third persons, or other creditors of the mortgagor than the mortgagee. (1 Hilliard on Mortgages, 407; 17 Pick. 139; 4 Ben. Monroe, 143; 2 Washb. on Real Prop. 1521; Id. 646; 24 Mo. 249; 23 Miss. R. 206; 24 Ala. R. 476; 2 Doug. R. 176; 4 Eq. Dig. 672; 7 Dana R. 66.)

Opinion of the Court—Upton, C. J.

By the Court, UPTON, C. J.:

In this case it is conceded that the plaintiff, who is respondent in this appeal, is entitled to the premises in controversy, unless the defendant has acquired title through the sale on execution under the judgment against the plaintiff's grantor, S. B. Mathews, in favor of Henry Marshall. One of the objections to the defendant's chain of title is that the deed from Marshall to the defendant is void for want of a sufficient description of the land it purports to convey.

All the other deeds offered in evidence describe the initial point by the words "beginning twenty chains north and fourteen and thirteen one-hundredths chains west" of a certain post, but the deed objected to uses the words "beginning twenty north, fourteen and thirteen one-hundredths chains west" of the post.

The language first above quoted occurs in all the preceding title-papers under which the respective parties claim, several of which have been read in evidence; it also occurs in the Sheriff's return on the execution, and in the deed executed by the Sheriff to Marshall, the defendant's grantor. A comparison of the deed under consideration with other deeds put in evidence shows an identity of language in every other descriptive particular, and the exact and literal correspondence of this deed in so many minute particulars with the other deeds leads to the conclusion that the draftsman in writing this deed attempted to copy from some one of the antecedent title-papers, or from the description contained in them; in other words, that he was engaged as the agent of the constructing parties in an attempt to describe the tract of land in question in the language employed in the old deeds. If that was the intent, the question is, has he made a writing which, being read by the light of surrounding circumstances, will identify the property sought to be conveyed? We find the discrepancy in language consists in omitting the word "chains" and the word "and" from the description contained in other deeds under which each of these parties claim title.

It is said in argument that the Court has no power to add to the language employed by the parties in their written contract, and it is correctly said that it is the province of the Court to ascertain the meaning of the language of the written contract, and not to make a contract for the parties.

If we attempt to find a meaning different from that claimed by the defendant, we shall not succeed without some liberality of construction. There is no force in the suggestion that "20.00" may refer to the course and not to a distance; the course being unqualifiedly north, cannot be either 20° east or 20° west of north, and we are driven to the alternative either to treat the description of the initial point as meaningless, or to resort to recognized rules of construction, to ascertain from the language of the deed, if possible, what the parties intended.

It is not sufficient that the interest can be proved by evidence which is independent of the language contained in the instrument. But if surrounding circumstances throw such light on the subject and on the language employed, as to leave no doubt what parcel of land is referred to in the written description, proof of those circumstances is not proof tending to contradict the writing. These proofs show that the grantor had previously bought a parcel of land, the boundary lines of which correspond exactly in course and in length with those mentioned in this deed. By the letter of these descriptions each deed must refer to the same initial point of boundary, or the one initial point must be directly north or south of the other, and there is nothing in the instrument, or in the circumstances, indicating the existence of more than one parcel that can answer to this description. When examined by the light thus thrown upon the subject, the instrument shows to a moral certainty what parcel of land was the subject of this contract.

Under such circumstances, the substance of the written instrument is to be regarded, notwithstanding clerical errors or inaccuracy of expression. In construing contracts, Courts are sometimes required to reject words (27 Maine, 285), or insert them (17 Vt. 479, 486), or to restrict the meaning of a word (12 Mass. 330; 13 Pick. 284; 11 Wheat.

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412), or to substitute words (11 Vt. 366), or to repeat words (8 Pick. 563).

A mere clerical error will not vitiate a contract where the interest of the parties can be ascertained with certainty from the instrument, and even when there is no clerical error, inasmuch as the same words are not always employed to express a given idea, and given words and phrases are not used by all persons, or by the same person, in all circumstances, in the same sense. Particular expressions must be compared with the context, and if it can be ascertained with certainty, from the instrument, what the parties intended, the instrument must be so construed as to give effect to the intent.

In the deed under consideration, the "chains" is the only unit of distance mentioned. The word "chains" is frequently used, and it occurs once in the description of the initial point. The failure to repeat it would be no departure from common modes of expression, and would scarcely attract attention if the word "and" had been retained where it occurs in this connection in the preceding deeds.

It is morally certain, from the language of this deed, when examined in connection with the situation of the parties and of the subject-matter, that in executing the deed the parties were contracting in reference to the land in controversy. This is the same degree of certainty that the most precise and formal language would produce, and is all that is required to constitute a valid contract.

The cases cited by the respondent contain nothing in conflict with the views here expressed. The first two of these, *Jackson v. Rosenfelt* (13 John. 97), and *Jackson v. Livingston* (Id. 537), are to the effect that on a sheriff's sale no property will pass under the general description, "all the lands and tenements of the defendant, situate, lying and being in the Hardenburg patent." In *Jackson v. Ransom* (18 John. 107), it was held that where a lot is once sufficiently described, mentioning the lot by an erroneous number does not vitiate the deed.

In *Peck v. Mallams* (10 N. Y. 509), a sheriff's deed recit-

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ing that he exposed to sale a parcel of land, describing it by boundaries, supposed to contain four hundred acres, "whereof one hundred acres was struck off to J. W.," and then proceeding to grant to J. W. "the before-mentioned premises," was held void for uncertainty. The defects in the last and in the two first deeds referred to are such that evidence of surrounding circumstances will not render the language of the instrument certain as to the parcel of land sold, but we do not think the deed under consideration is subject to that objection.

Another objection to the sufficiency of the defendant's title arises out of the circumstance that the judgment upon which the Sheriff's sale was based, was obtained in an action at law upon a promissory note, to secure the payment of which a mortgage had been given on the same lands that were sold. It is claimed that the mortgaged premises were not subject to such sale. The sale under execution was made June 21, 1862. This was before the present Code took effect and some nine years before the commencement of this action. The Court is called upon to determine whether such a sale made under the statute of 1854 shall be treated as void, assuming that the statute did not contemplate sales of mortgaged premises without foreclosure of the mortgage; that the practice under the statute of 1854 should have been that which prevailed when the mortgage was a conveyance of the legal title; and that the right of the mortgagee did not merge in the judgment when he proceeded by action on the note or bond which the mortgage is given to secure; the question arises whether the departure from regular practice rendered the sale absolutely void, and the Sheriff's deed a nullity.

In *Waller et al. v. Tute et al.* (4 B. Monroe 143), the assignee of notes secured by mortgage, who held them as collateral security, had proceeded at law and sold the mortgaged premises and had applied the proceeds in part payment. The mortgagee redeemed the notes from the assignee and brought suit to foreclose the mortgage for the balance due on the notes. Four years had elapsed since the sale, and the purchaser at Sheriff's sale had conveyed

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a part of the land to another. The Appellate Court reversed a decree which directed the land to be sold to satisfy the mortgage, after first refunding the amount that had been bid for the part thus conveyed, and directed the bill to be dismissed as to the latter purchaser.

It would seem that the proceeding on the execution was not deemed void, notwithstanding that under the law, then prevailing the mortgage conveyed the legal title.

Cases are cited from Massachusetts in which it is held that the mortgaged premises should not be sold except upon foreclosure. In these cases the ruling was put expressly on the ground that a purchaser at a sale under a decree of foreclosure would, by the statute, have two years in which to redeem, and a purchaser under a judgment would have a much less time. Such difference as to the time in which the premises may be redeemed does not exist in this State, and did not exist at the time of making the sale which is now under consideration. (*Atkins v. Sawyer*, 1 Pick. 351; *Washburn v. Goodwin*, 17 Pick. 137.)

In the cases cited by the respondent, to show that in the State of New York a judgment creditor is not entitled to sell mortgaged premises under a judgment thus obtained, it was held that the sale, although erroneous and voidable, was not void, and the title thus obtained was held valid.

The confirmation, in this case, was made in November, 1862, and the regularity of the proceedings is now questioned for the first time, being attacked collaterally in an action at law. If the Circuit Court has power in this action to determine the questions of fact, as to the existence and character of the mortgage, and the question of law as to its being a ground for exempting the mortgaged premises from sale, the same questions must have been within the jurisdiction of that Court when they became pertinent on the motion to confirm the sale. On the hearing of that motion the Court was proceeding within its jurisdiction, and if there had been such departure by the Sheriff from ordinary modes of proceeding that it was error to confirm the sale, and if the sale would have been enjoined in equity, or set aside, on motion by the Court out of which the execution issued,

it does not follow that the proceeding was void. In the case under consideration there was an execution directing the Sheriff to sell the debtor's property, and it does not appear that it was shown to the Court, or to the officer, that the land had been mortgaged to secure the debt, nor that any objection was made to the confirmation. If a reason existed why this particular parcel of land should not be sold, the debtor should have brought the matter to the attention of the Court.

Upon this point and upon some other alleged irregularities in the mode of conducting the sale, the respondent's argument proceeds on the assumption that the power to sell on execution is to be classed with those powers in which the jurisdiction and authority is created by and derived solely from the statute, that any departure from the mode prescribed renders the whole proceeding void. In this argument little weight is given to that feature of our practice which subjects these proceedings to judicial examination.

The practice at the time of the sale in question, as well as the present practice, contemplated a judicial determination of all questions of regularity in the execution of the process, and the decision of a Court having jurisdiction is conclusive of the point decided, unless reversed. (*Nagle v. Macy*, 9 Cal. 426; *Tustin v. Gaunt*, present term, *post.*)

The same may be said in regard to objections made to the form of the Sheriff's deed, which fails to recite in direct terms the rendition of the judgment, but in place of doing so recites the substance of the execution and the proceedings upon the levy and sale. There is also an omission of the word "no" in the Sheriff's return of the sale. The statute then in force required lands that were occupied to be sold on the premises, and unoccupied lands to be sold at the court-house door. By what seems beyond a doubt a clerical error, the return, which shows a sale at the court-house door, contains this clause: "There being occupant of the premises."

Another point is made that the recitals in the Sheriff's return and in the deed, in regard to posting notices "in

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three public places in this county," do not show a compliance with the statute which requires (Stat. 1855, p. 123, § 18) notice to be posted "in three public places of the county where the property was situated, and also where the property is to be sold." The respondent construes this as requiring the posting of notices in four places.

Conceding that the language imports that one of the notices should be at the place of sale, rather than that the three notices should be in the county where the land is situated and where it is to be sold, the letter of the law may be complied with by posting at three public places, one of them being the place of sale.

But aside from any such question, on the principle above suggested, the construction of the statute was a question for the Court on the motion for confirmation; and the decision of the Court confirming the sale, even if it was erroneous, ought not to be treated as a nullity. (*Griffith et al. v. Bogert et al.*, 18 How. 158.)

The effect of an order or decree of confirmation having been involved in some other cases heard at this term, as well as in this case, the subject has been very fully discussed by counsel, and after a very full and careful examination of all the authorities presented on this point, this Court entertains the opinion that without doing violence to any principle of law, an order of confirmation may be regarded as a final adjudication, touching the regularity of all proceedings taken in the execution of final process.

If confirmations are not to be thus respected, an approval under the Act of January 7, 1854, or an order of confirmation under the present Code, is an idle ceremony, and the statute which requires such approval is enacted to no purpose. By giving that respect to these decisions which should attach to the final orders, judgments and decrees of judicial tribunals, titles to real estate are fortified and holders of real property are relieved from the danger of vexatious litigation, which would become formidable if every judicial sale should be treated as the exercise of a naked statutory power in which the title must rest on a literal

Points decided.

compliance with the statutory directions that may from time to time be enacted, regulating the mode of conducting sales.

A new trial should be granted.

DAVID TAGGART, RESPONDENT, v. ORVILLE RISLEY
ET AL., APPELLANTS.

GRANTOR WHEN ESTOPPED.—If the seizin or possession of a particular estate is affirmed in a deed, either in express terms or by necessary implication, the grantor and all persons in privity with him will be estopped from ever afterwards denying such seizin or possession.

DEED CONVEYS AFTER-ACQUIRED TITLE—WHEN.—If the terms of a deed clearly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty.

IDEM.—Where a grantor covenants to warrant the premises against all persons claiming by, through or under himself, and he subsequently acquires the legal title to the premises, that legal title will inure to the benefit of the grantee.

Per Thayer, J., dissenting :

CONVEYANCE.—The office of our modern conveyances is simply to convey the estate which the grantor has. It is the policy of the law to bind a party to a deed only by express stipulation covenant.

IDEM—EFFECT OF THE WORDS “GRANT, BARGAIN AND SELL.”—The words “grant, bargain and sell” in a conveyance do not imply that the grantor is the absolute owner of the premises conveyed.

IDEM—COVENANTS IN.—A covenant to defend the grantee, his heirs and assigns, in the quiet and peaceable possession of the property conveyed, against the claims of the covenantor or persons claiming under him, necessarily refers to existing claims, not to those which the covenantor may thereafter acquire. The object of such a covenant is to defend the grantee against acts done or suffered to be done by the covenantor, whereby the title conveyed may be jeopardized; nor does such a covenant operate as a personal obligation of the covenantor not to buy an outstanding claim against the property, and he is not estopped by such covenant to buy and assert such an outstanding claim. Matter in a deed to operate as an estoppel must be of such a character that, if untrue, the party alleging it would be liable in some form of action, either in law or in equity, to respond in damages to the party injured for a covenant broken or for a deceit and fraud.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

4	235
7	108
8	261
8	263

4	235
228	104
41*	1107
4	235
27	243

Argument for Appellants.

Hill, Thayer and Williams, for Appellants.

A special covenant for quiet enjoyment, limited to the claims of the covenantor and those claiming under him, does not estop such covenantor to afterwards acquire and assert against his covenantee an adverse title which was in a third person at the time the covenant was made, unless such third person derived his title from the covenantor. (Rawle on Covenants, 413; 3 Washb. on Real Prop. 665; *Lownsdale v. Portland*, 1 Ogn. 395; *Farnum v. Loomis*, 2 Ogn. 29; *Jackson v. Bradford*, 4 Wend. 622; *Comstock v. Smith*, 13 Pick. 116; *Miller v. Ewing*, 6 Cush. 34; *Lamb et al. v. Burbank*, 1 Sawyer, 227; *Clark v. Baker*, 14 Cal. 612.)

If a deed contains false representations, even in the form of recitals, that the grantor was seized of the premises in fee, the grantor will be estopped to take advantage of the falseness of his representations and claim the land against his grantee who relied upon their truth in making his purchase. The estoppel in such case is based upon the false representations, and not upon the covenant. (3 Washb. on Real Prop. 468; *Douglass v. Scott*, 5 Ohio, 198; *Clark v. Baker*, *supra*.) If in such case the grantor was permitted to assert the after-acquired title against his grantee, the grantee would immediately have his action against the grantor for the fraud. (*Culver v. Avery*, 7 Wend. 380; *Haight v. Hagh*, 19 N. Y. 464.) But the Courts settle the matter at once by applying the doctrine of estoppel, thus avoiding circuity of action, and it is upon this principle of avoiding circuity of action that the doctrine of passing title by estoppel is based. (*Jackson v. Bradford*, *supra*; *Jackson v. Waldron*, 13 Wend. 178; *Bush v. Cooper*, 26 Miss. 599.) The words in the granting clause—"grant, bargain, sell, alien, remise, release and convey"—imply nothing except an intention to pass whatever title the grantor had (Rawle, 434); while the covenant which follows, and which is to be considered in construing the deed (*Cole v. Hawes*, 2 Johns. Cas. 203), plainly indicates that the grantor did not intend to become a guarantor of the goodness of the title.

Argument for Respondent.

Mitchell & Dolph, for Respondent.

Where a deed bears upon its face evidence that the grantor intended to convey, and the grantee expected to become invested with an estate of a particular description, the grantor will be estopped from ever afterwards denying that he was the owner of the particular estate at the time of the conveyance, whether there are any recitals or covenants in the deed or not. (*Lamb v. Davenport*, 1 Sawyer, 609; 2 Washb. on Real Prop. 477; Rawle on Cov. 455; *Doe v. Oliver*, 2 Smith L. Cas. 738; *Van Rensselaer v. Kearney*, 11 How. 325; *Clark v. Baker*, 14 Cal. 629; *Jackson v. Waldron*, 13 Wend. 178; *Dennison v. Ely*, 1 Barb. 610; *Fitzhugh's Heirs v. Tyler*, 9 B. Monroe, 561; *Fairbanks v. Williamson*, 7 Greenleaf, 96; *White v. Erskine*, 1 Fairfield, 306; *Kimball v. Blaisdell*, 5 N. H. 533; *Trull v. Eastman*, 3 Met. 121; *Bean v. Welch*, 17 Ala. 722; *Wright v. Reynolds*, 24 Miss. 689.)

It is apparent from the face of the deed that the parties were dealing with the fee. The covenant for quiet enjoyment is conclusive upon the question as to what estate was intended to be conveyed, and indicates that the intention was to convey the land absolutely. (*Doe v. Oliver*, Smith's L. Cas. 740; *Smith v. Baker*, 1 Young and Collier Ch. 223; *Robertson v. Nelson*, 38 N. H. 48; *Chauvin v. Wagner*, 18 Mo. 531.)

The covenant to warrant and defend the grantee, his heirs and assigns in the peaceable and quiet possession of the lot, extends to all acts of the covenantor, whether tortious or under claim of title. (Rawle on Cov. 167, 170; *Sedgwick v. Hollenback*, 7 John. 376; *Mayor of New York v. Mabie*, 3 Kern. N. Y. 156; *Crosse v. Young*, 2 Shower, 425.)

The covenant in this deed is not simply a covenant of *non claim*; but even as a covenant of *non claim* it would estop Risley from asserting an after-acquired title. (*Gee v. Moore*, 14 Cal. 472; *Kimball v. Blaisdell*, 5 N. H. 533; *Trull v. Eastman*, 3 Met. 121; *Gibbs v. Thayer*, 6 Cush. 33; *Newcomb v. Presbry*, 8 Met. 406.) A covenant of warranty against the grantor and his heirs will estop them from setting up an after-acquired title. (*Sweet v. Green*, 1 Paige, 473.)

Opinion of the Court—McArthur, J.

By the Court, MCARTHUR, J.:

This suit was instituted by Taggart against Risley and others, to quiet the title to lot 7, in block 212, in the city of Portland, and to compel the execution of conveyances thereof by the appellants. It appears from the pleadings that, on June 25, 1850, D. H. Lownsdale, being then in possession of the lot aforesaid, executed a deed conveying all his interest in said lot to W. W. Chapman, wherein he covenanted to warrant and defend the same to said Chapman, his heirs and assigns, against all persons except the United States; and also, that should he afterwards obtain title to said lot *from the United States*, he would convey the same to said Chapman, his heirs and assigns, by deed of general warranty. On November 8, 1852, Chapman executed a conveyance of said lot to Risley, and he (R.), on December 18, 1860, for a valuable consideration, sold the said lot to Charles Goodnough, and executed to him a deed therefor. Risley's wife joined in this conveyance, which reads as follows:

"This indenture, made the 18th day of December, 1860, between Orville Risley and Amelia, his wife, of the county of Multnomah and State of Oregon, of the first part, and Charles Goodnough, of the county of Multnomah and State aforesaid, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of eight hundred dollars, lawful money of the United States to them in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released and conveyed, and by these presents do grant, bargain, sell, alien, remise, release, and convey, unto the said party of the second part, and to his heirs and assigns forever, the following described property, to wit: Lots No. 7 and 8, in block No. two hundred and twelve (212), in the city of Portland, in the county of Multnomah and State of Oregon, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and also

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all the estate, right, title, interest, property, possession, claim and demand, as well in law as in equity, of the said parties of the first part of, in and to the above-described premises, and every part and parcel thereof, with the appurtenances, to have and to hold, all and singular, the above-described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said parties of the first part, for themselves and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming, or to claim, the same, shall and will warrant, and, by these presents, forever defend.

(Signed)

“ORVILLE RISLEY. [SEAL.]”

“AMELIA RISLEY. [SEAL.]”

This deed was duly witnessed and acknowledged. The interest thus acquired by Goodnough in and to said lots passed by a chain of regularly executed mesne conveyances down to Taggart, who purchased on November 8, 1870. On May 30, 1861, Lownsdale, having obtained title to the undivided one-fifth of said lot No. 7, from the United States, and of another undivided one-fifth from Isabella Gillihan, executed to Risley a deed of quit-claim to said lot. Under this deed Risley claims to be the owner of one undivided one-fifth of said lot—that of said Isabella Gillihan.

Risley, in his separate answer, denies the deed from himself to Goodnough, as alleged, and pleads Lownsdale's deed of June 25, 1850, and his own deed to Goodnough of December 18, 1860, attaching them as exhibits. He also avers that Lownsdale had no interest in, or right to, the lot in controversy when he executed the deed of June 25, 1850, except the mere naked possession, and did not pretend to have any greater interest. That he (L.) did not afterwards obtain title from the United States, except for the undivided one-fifth of said lot, and was not bound by his covenant, in the deed of 1850, to convey to Chapman,

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or his assigns, any more than said one-fifth, and that he (Risley) had no interest beyond the said undivided one-fifth when he and his wife executed the deed to Goodnough. That afterwards, in 1861, by deed from Lownsdale, he (Risley) became the owner of the undivided one-fifth which Lownsdale had acquired from Isabella Gillihan and that his right thereto was unaffected by his deed to Goodnough.

A demurrer was interposed to this answer, which, after argument, was sustained, and from the order sustaining the demurrer, and the decree thereon rendered, the said Risley appeals.

The deed of June 25, 1850, is simply a deed of release and quit-claim with the addition of the covenants mentioned above.

The main question in this case is briefly this: Does the deed from Risley to Goodnough estop Risley to claim the after-acquired *one-fifth*, which Lownsdale acquired from Gillihan and conveyed to Risley after the execution of the deed to Goodnough by Risley and wife? After much reflection a majority of the Court has reached the conclusion that, from the language employed in the deed of December 18, 1860, the parties were evidently dealing with the fee, and that Risley did not intend merely to convey lots 7 and 8, in block 212, by way of release or quit-claim, but that he intended to convey, and the grantee expected to become invested with, the very land itself, as an entirety, with the absolute ownership thereof with the fullest possible estate, the fee simple. It is important at this point to note again that there is in this deed the following covenant: "And the said parties of the first part, for themselves and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend."

It cannot but be considered that the claim which Risley now seeks to set up under the confirmatory deed from Lownsdale, of May 30, 1861, is entirely inconsistent with his own deed of December 18, 1860; and although there are

no recitals or covenants of title in the deed of December 18, 1860, yet, under the authorities, Risley is estopped to assert that any outstanding title existed inconsistent with what he undertook to sell and convey to Taggart, more especially in view of the personal covenant not to disturb the grantee in his possession.

In *Van Rensselaer v. Kearney* (11 How. 325), the Court, after reviewing a number of English and American cases, says: "The principle deducible from these authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance, must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood,

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and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

Thus it will be seen that the ancient doctrine that estoppel grows out of warranty has been departed from by the Supreme Court of the United States, and it is now held that a deed without warranty may operate as an estoppel, in order to prevent a failure of the purpose with which it was executed. (*Van Rensselaer v. Kearney*, *supra*; *Fitzhugh's Heirs v. Tyler*, 9 B. Mon. 559.)

The question is one of intention (3 Met. 121; 6 Cush. 33), and the whole instrument must be taken together, and effect must be given to its meaning as derived from each and every part of it. If the terms of a deed plainly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantee had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, though it contain no warranty. (*Fairbanks v. Williamson*, 7 Greenleaf, 96; *White v. Erskine*, 1 Fairfield, 306; *Kimball v. Blaisdell*, 5 N. H. 533; *Trull v. Eastman*, 3 Met. (Man.) 121; *Bean v. Welch*, 17 Ala. 772.)

In *Doc v. Oliver* (2 Smith's Ldg. Cases, 637), it is said that these decisions abandon the technical ground, taken in some of the earlier cases, that estoppel grows out of warranty, and rest it upon the broader basis of giving effect to the intention of the parties as expressed in the deed. No reason exists, under this view of the law, for attributing a more conclusive effect to the covenants in a deed than to any other portion of its contents.

Nor can Risley avoid the consequences of his covenant for quiet enjoyment. He and his heirs are certainly bound by that covenant; and as limited covenants of this character are good as against the persons named therein, he is estopped to set up the after-acquired title, for by being permitted to do so he would disturb the possession and enjoyment of his own grantee. Even in the case of a quit-claim deed the law is that where the grantor covenants to warrant the premises against all persons claiming by or under himself, and he subsequently acquires the legal title to the

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premises, that legal title will inure to the benefit of the grantee. (*Sweet v. Green*, 1 Paige, 47.)

Decree affirmed.

THAYER, J., dissenting:

It appears from the pleadings in this case that on the 25th day of June, 1850, one D. H. Lownsdale, being then in the possession of a certain tract of land embracing the lot in question, to wit, lot No. 7, in block No. 212, in the city of Portland, conveyed by deed in writing, under seal, to one W. W. Chapman, all his right, title and interest in said lot, and covenanted in and by said deed to warrant and defend the same to said Chapman, his heirs and assigns, against all persons, except the United States, and that should he afterwards obtain a title thereto from the United States he would convey the same to said Chapman, his heirs and assigns, by deed of general warranty; that on the 8th day of November, 1852, said Chapman conveyed to Risley, the appellant herein, said lot; that on the 18th day of December, 1860, said Risley and his wife conveyed said lot to one Goodnough by deed of that date, the granting clause of which contains in substance the following language: "That the said parties of the first part, for and in consideration of the sum of eight hundred dollars, etc., grant, bargain, sell, alien, remise, release and convey unto the said party of the second part, and his heirs and assigns forever, lots 7 and 8, block 212, etc., together with all and singular the hereditaments and appurtenances thereunto belonging, or in any way appertaining, and all the estate, right, title and interest, property, possession, claim and demand, as well in law as in equity, of the parties of the first part, of, in and to the above-described premises, and every part and parcel thereof, with appurtenances;" and which said deed also contains the following covenant: "And the said parties of the first part (Risley and wife), for themselves and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to

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claim the same, shall and will warrant, and, by these presents, forever defend."

That the interest which Goodnough acquired in said lot, passed by a chain of mesne conveyances, duly executed, to Taggart, the respondent herein, who purchased in November, 1870; that said Daniel H. Lownsdale had no interest in, or right to, said lot, when he made the deed of June, 1850, and only acquired from the United States one-fifth interest therein; that in May, 1861, said Lownsdale having acquired from one Isabella Gillihan another one-fifth interest in said lot, executed to appellant a quit-claim deed of the same.

It is admitted that the deed from Risley and wife to Goodnough, executed December, 1860, operated to pass the fifth interest in said lot which Lownsdale acquired from the United States, and the respondent claims that appellant is estopped by said deed from claiming title to the fifth interest acquired from Lownsdale in May, 1861. This presents the only question in the case, and it resolves itself into this proposition: Does the deed from Risley and wife to Goodnough, of December, 1860, operate to estop Risley from asserting the title which he acquired from Lownsdale in May, 1861?

It is conceded that when a deed of real property contains an averment or recital, that the grantor is the owner of a particular estate therein, or of any other fact that becomes material, said grantors will ever after be estopped from disputing said averment; and it is also conceded that when a deed to real property contains a general covenant of title, it will operate as an estoppel against an after-acquired title included in the terms of the covenant. But it is denied that the appellant is estopped from claiming the after-acquired fifth interest in said lot, obtained from Lownsdale under the deed of May, 1861, in consequence of any terms, recital, averment, or covenant, contained in the deed of December, 1860. The language of the granting clause, in said last-mentioned deed, is very strong. It contains more words than necessary to pass the actual interest Risley had; but does it, in legal effect, purport to convey anything more

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than the interest Risley then had? The authorities seem to be somewhat conflicting upon the question, as to whether there is a difference between a deed granting the right, title and interest of the grantor, and one which grants the premises. The office of our modern conveyances is simply to convey the estate which the grantor has. At common law, such conveyance would only operate to raise a use; but, by form of the statute of uses, the use was transferred into possession, and the interest of the *cestui que use* into a legal estate.

There was also at common law, in certain deeds, an implied covenant of title. This, however, depended upon the phraseology of the granting clause. When the words "I have given" (*dedi*) were used certain covenants were implied, but not so when the word grant (*concessio*) was employed (2 Caine's R. 188); but our statutes have abolished implied covenants in all cases (Mis. Laws, ch. 6, § 6), and have provided that a deed of quit-claim and release, of the form in common use, shall be sufficient to pass all the interest which the grantor could lawfully convey by a deed of bargain and sale.

It seems to me from principle, as well as from express enactment of statute, that it is the policy of the law to bind a party to a deed only by express stipulation covenant. The office of a deed is ordinarily performed when it operates to transfer to the grantee the existing title of the grantor to the thing granted.

Under this view of the case, I cannot believe that the words in the granting clause of the deed of December, 1860, show any intent to convey from Risley and wife to Goodnough any better or further title than the grantor then had.

I cannot imagine how there could have been any other interest, unless it be claimed that the terms "grant, bargain and sell," etc., used in said deed in reference to the property in question, imply that the grantors were the absolute owners of said property, and this I would regard as contrary, at least, to the spirit of the provisions of our statute, and to the principles of law on that subject.

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The next question I propose to consider is as to the effect of the covenant contained in the deed of December, 1860.

This is a special covenant of quiet enjoyment, not as against all the world, but against the grantors and their heirs lawfully claiming or to claim the same. It was contended by the counsel for the respondent, and with much reason, that the appellant undertook, by the terms of the covenant, to warrant and defend Goodnough, his heirs and assigns, against any claim the appellant, or his heirs, might attempt to assert; that it would be a violation of the undertaking in that behalf to buy an outstanding title and attempt to claim under it.

If it could be reasonably supposed that the covenant referred to was intended as an indemnity against personal acts of the covenantor, there would be more force in the position. But a covenant in a deed to real property must, it seems to me, be presumed to relate either to the condition of the title or to a further assurance regarding it; at least I am of the opinion that the covenant in question relates in some form to title, and was not intended as a personal engagement. The question then is, what is its legal effect? If it had been a general covenant to warrant and defend the grantee in the quiet and peaceable possession of the lot in question, it would undoubtedly operate as an estoppel against the appellant and all persons claiming under him. But have we the right to give a covenant of the description of the one under consideration the same legal effect? I cannot so conclude. The covenant in question only is to defend the grantee, his heirs and assigns, in the quiet and peaceable possession of the property against the claims of the covenantor, or persons claiming from him, and must necessarily mean existing claims, not claims which the covenantor might thereafter acquire. That could not have been the intention, for it would certainly be no more damaging for the covenantor to acquire an outstanding claim and assert it, than for the holder of such claim to assert it; and I think it not only a reasonable construction, but the obvious intention of the parties, that appellant

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should only warrant and defend against claims he had created—in other words, against his own act done or suffered, whereby the title conveyed might be jeopardized. He had purchased from Chapman the lot in question, but acquired no title except actual possession and the conditional covenant of Lownsdale before mentioned, and Lownsdale never acquired any title to said lot from the United States except one-fifth interest.

In this condition of affairs, the appellants made the deed of December, 1860, to Goodnough, in which they bound themselves concerning the title by the covenant contained therein. If it had been intended by the parties that appellants should be bound to defend Goodnough, his heirs and assigns generally, and against every one, why did they not have a general covenant to that effect inserted in said deed? It appears very plain to me that the parties to that deed only intended to pass to Goodnough, his heirs and assigns, the unincumbered title, interest or right which Risley had acquired from Chapman, and undoubtedly a party might be bound by personal obligation not to buy any outstanding claim against property. But I do not believe that is the effect of this covenant, or was so intended by the parties. If I am correct in this, then the appellant can assert the claim to the fifth interest in said lot which he purchased from Lownsdale without violating the terms of the covenant in question, and the deed to Goodnough cannot in any event operate as an estoppel. The general theory upon which the law of estoppel by deed is applied, is to prevent circuity of action, and I believe this to be the true doctrine.

Senator Tracy, in the case of *Jackson v. Waldron* (13 Wend. 208), says: "That the best, most rational, and only general principle which can be extracted from the numerous and contradictory decisions upon the subject is, that in order for a matter to operate as an estoppel in a deed, it should be such matter, and so alleged, that if untrue, the party alleging it would be liable in some form of action, either in law or equity, to respond in damages to the party injured for a covenant broken, or for a deceit and fraud."

This view, to my mind, is a very satisfactory test. I am

Opinion of Thayer, J., dissenting.

aware, however, that it has been attempted recently to place the rule on different grounds—to place it upon the basis of giving effect to the intentions of the parties as expressed in the deed, and I would have no objection to its application in such cases, provided such intentions were clearly expressed; but to speculate as to what the parties to a deed intended to convey in the absence of averment, recital or covenant, would be uncertain indeed. In the case under consideration, there would be a breach of the covenant in question, had Lownsdale made the claim to the fifth interest, instead of transferring it to the appellant, and I cannot think it is any such breach for the appellant to acquire it and assert a claim thereto. This is so, at all events, if the construction I place upon the covenant is correct. The deed could not, therefore, operate as an estoppel upon the principle of avoiding circuitry of action, and if claimed upon the other ground, it is necessary to establish that the parties to the deed intended to convey this after-acquired interest, and that such intention is expressed in the deed. Viewing the transaction by the light of surrounding circumstances, as shown by the pleadings in the case, and considering the various parts of the deed when taken together, I do not think such intention is shown. The question is by no means free from doubt, but I think the doubt arises more from the peculiar, and I might say awkward, language employed in the deed, than from any embarrassment in construing covenants of this character. A covenant against a grantor has had a long and well-established signification, and I am not aware that the Courts have attempted to construe said covenant as meaning anything more than I have indicated; that is, that the grantor and his heirs will defend against his past acts. The parties to this deed have chosen that kind of covenant, and I do not think its effect should be extended unless the language is unmistakable, and, as I have before remarked, it could not have been the intention of the parties that the grantor undertook merely to disqualify himself and his heirs from asserting an outstanding title, leaving all other persons free to do so. When the appellant procured title from Lown-

Points decided.

dale of the fifth part of the lot in question, he succeeded to all the rights of Lownsdale respecting it, and if Lownsdale or his grantor had the legal right to demand this interest, why should not the appellant be permitted to do so?

For the foregoing reasons the decree of the Court below should be reversed.

H. K. HANNAH, DISTRICT ATTORNEY OF THE FIRST JUDICIAL DISTRICT, RESPONDENT, *v.* GILES WELLS, JR., JOHN W. WELLS, WM. SONGER AND GILES WELLS, SR., APPELLANTS.

AUTHORITY OF THE DISTRICT ATTORNEY TO SUE IN HIS OWN NAME.—The District Attorney is authorized by statute to sue as plaintiff in a civil action brought on an undertaking given as bail in a criminal case.

COMPLAINT IN AN UNDERTAKING.—In a civil action on an undertaking in the nature of bail for defendant's appearance in a criminal case, the complaint should show that the prisoner was charged with a crime, and it is not sufficient to state that he was charged with "shooting and killing" another.

CHARGE NEED NOT BE IN WRITING.—Where a defendant is brought before a committing magistrate on a charge of felony, it is not essential to the jurisdiction that the charge should be in writing.

Per McArthur, J., dissenting:

STATEMENT OF CRIME CHARGED IN AN UNDERTAKING ON ARREST.—It is not necessary, in order to create a liability against the sureties on an undertaking on arrest for crime, that the crime for which the person is admitted to bail should be set forth or described in the undertaking of bail with the same exactness that is required in an indictment or commitment. It is sufficient if the crime is referred to in general terms.

IDEM.—Every killing of a human being is presumed to be unlawful. The words "shooting and killing" describe a crime generally, and, in an undertaking, in a criminal proceeding, are a sufficient description of the crime charged to create a liability against the sureties thereon.

APPEAL from Jackson County.

The facts are stated in the opinion of the Court.

E. Steel, for Appellants.

J. H. Stinson and J. R. Neal, for Respondent.

Opinion of the Court—Upton, C. J.

By the Court, UPTON, C. J.:

This appeal is from a judgment of the Circuit Court overruling a demurrer to the complaint in an action on an undertaking as bail in a criminal case.

The demurrer specifies two points of objection, the first being that the State and not the District Attorney should have been plaintiff in the cause, and the other that it does not appear on the face of the complaint that the Court in which the undertaking was required had jurisdiction of the subject.

The action is brought in the name of H. K. Hannah, District Attorney of the First Judicial District, as plaintiff, and the appellants claim, in support of the first point, that the case is within the provision of § 27 of the Civil Code, that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in § 29." The appellants rely on the circumstance that § 27 and the following sections specify certain exceptions, and they claim that the express mention of these exceptions excludes all others, and shows that the Legislature intended there should be no other exceptions than those there mentioned.

The respondent relies on § 342 of the same Act, which provides that "fines and forfeitures may be recovered by an action at law in the name of the officer or person who by law is authorized to prosecute for them." The rule invoked by the appellant that express mention of specific exceptions raises an inference against all other similar exceptions, is an acknowledged rule of construction in all cases where it is applicable; but the present case is not within the rule. The respondent's right to appear as plaintiff is not based upon an inference, but upon a direct affirmative enactment, and the exceptions above referred to include "persons specially authorized by statute" among those who may sue, although not the real parties in interest.

Penal statutes frequently direct what disposition shall be made of fines recovered, and various statutes provide different modes of disposing of the money thus obtained. In some cases fines or forfeitures go to a particular municipal

corporation; in other cases, to a particular fund or object; and, in still other cases, the money recovered on a fine or forfeiture may be devoted to several different purposes; and it may be in some cases a matter requiring much consideration to determine who may be the real party in interest. Section 342 (Civil Code) simplifies the proceeding by permitting the action, in all these cases, to be brought in the name of the officer who is authorized to sue. It being expressly provided that actions of this class may be brought in the name of the officer, and the provision not being repugnant to the more general provision above referred to, the Court is of the opinion that the action is properly brought in the name of the officer.

On the second point, that, by the complaint, it does not appear that the Court, in which the undertaking was required, had jurisdiction, it is necessary to observe a distinction between a statement of the essential facts, and a statement of the evidence that will sustain or establish a cause of action. As the case is now presented, the Court is not called upon to determine whether the evidence mentioned in the complaint, and which the plaintiff claims the right to introduce, is sufficient to establish a cause of action.

The complaint alleges that on an examination had before a Justice of the Peace, Joseph Wells was held to answer the charge of "shooting and killing one James Dennis;" that these defendants entered into an undertaking for the appearance of the said Joseph Wells in the Circuit Court, etc., to answer the charge of shooting and killing one James Dennis, and that the said Joseph Wells afterwards made default.

The principal point made in this connection by the appellants is, that it is not shown by the complaint that Joseph Wells was charged with a crime; that it should be alleged that the examination was upon a charge of murder or manslaughter, or at least that the prisoner was charged with some crime known to the law, otherwise the Justice would have no jurisdiction, and the undertaking would be void.

The complaint also avers that the Grand Jury found an in-

Opinion of the Court—Upton, C. J.

dictment charging said Wells with the crime of murder in shooting and killing James Dennis, and sets out copies of the undertaking and of the entry of default, but it is not directly alleged that Wells had been charged with murder at the time he was admitted to bail on the undertaking in question.

It was admitted on the argument that the undertaking recites that Wells was held to answer on a charge of "shooting and killing James Dennis," and that there was no written complaint on file charging a crime in other language than that used in the recital, and the case has been argued on the theory that unless the allegations of the complaint in this cause can be sustained as setting forth a cause of action, no action can be maintained upon the undertaking.

It is assumed that if there was not a written complaint laid before the magistrate, sufficient of itself to be sustained as charging a crime, there can be no proof that the magistrate had jurisdiction.

The respondent claims, substantially, that the defects in the complaint and in the recitals, set out in the undertaking, are defects in form only, which should be disregarded, and that inasmuch as the complaint sets out correctly the circumstances that transpired in the Magistrate's Court, it is in proper form and presents the merits of the case. Assuming that all the material facts that can be proved are now before the Court, he urges that parties who have entered into an undertaking of this kind should not be permitted to defeat their contract because of a mere matter of form; that the objections to the form of charging the crime should have been made before the committing magistrate, and that the informality of the charge should be deemed waived. He cites authorities to the effect that an admission in the recitals of an undertaking that the defendant was duly held to bail will estop the sureties. If it is true, as this argument assumes, that the defendant Wells was legally in custody, charged with felony, and was released at the request and on the undertaking of the defendants, not only public policy but correct practice requires the Court to sustain a complaint setting out those facts; and if

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it were clear that this complaint states all the essential facts that can be proven, in regard to the nature of the charge and the magistrate's jurisdiction, this Court would be disposed to go to the limit of its discretion in sustaining its allegations; but the complaint states circumstances and leaves the important fact, in regard to the arrest and custody being on a charge of felony, to be inferred. The respondent asks the Court to infer, from the circumstances set out, a fact which is not alleged; namely, that the defendant was charged with a felony. The pleader should state the essential facts which he thinks will be inferred from the proof, and leave the circumstances to be adduced on the trial in support of the truth of what is alleged.

One branch of the fact necessary to constitute the cause of action is, that the defendant Wells was charged with a crime—that an examination was had, and he was held to answer, or at least that he was in custody on the charge. The pleader should have charged these facts, if he believed them to be true, and he should not insert in the complaint what he believes to be the proofs, and omit the material fact which he thinks those proofs will establish.

If an averment that Wells was charged with a crime shall be put in issue, and a question arises on the trial as to the sufficiency of the evidence to prove that he was charged with murder, the question whether the complaint against the prisoner was sufficient can be finally determined on the trial. I am of opinion that the complaint in this cause cannot be sustained, but that final judgment on the merits of the cause should not be rendered in favor of the defendants at the present time, because it is evident from the arguments of counsel that the subject-matter that was intended to be litigated is not before the Court. I cannot assent to the position assumed by the counsel of the appellant, that the defect in the form of the complaint filed in the Justice's Court is fatal to the jurisdiction of the committing magistrate. In cases where a felony is charged, the law does not require that the complaint shall be in writing before the magistrate can have jurisdiction to proceed in the discharge of his duties. It is of constant occurrence that persons are

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brought before magistrates without warrant, and charged with crime by persons who perhaps are unable to write, and much less able to draw up a criminal charge in apt words. Any person who sees a felony committed is authorized to arrest a felon without a warrant and take him before a magistrate; and there is nothing in the statute, or the nature of the proceeding, to render it necessary, or reasonable, that the magistrate should set about drawing up a formal written charge before he commences the examination of witnesses.

Under § 383 he has power, if a continuance becomes necessary, to commit the defendant or to discharge him upon his giving bail, before the examination is commenced, and if no continuance is required he proceeds immediately with the examination. Bail may be taken before a formal written charge is filed. Before a defendant can be put upon his trial in a criminal case there must be a written complaint (Crim. Code, §§ 82 and 83); but when application is made for a warrant of arrest under § 343 of the Criminal Code, or when a defendant charged with felony is brought before a magistrate for examination upon an arrest without a warrant, under § 379, the law does not require that the complaint shall be in writing before the magistrate has jurisdiction to take evidence in the former case, or to proceed with the examination in the latter. The complaint may be oral—the magistrate must inform the accused of the charge; but it is not made essential to the jurisdiction that the charge shall be previously reduced to writing. Section 401 of the Act provides that “if it appear from the examination that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof,” the defendant must be held to answer; and it has been held under similar statutes that when the evidence fails to show that the crime specially charged or designated in the warrant has been committed, but the acts proven against the defendant constituted a different crime from the one designated, the magistrate should hold the defendant to answer for the crime disclosed on the examination. There is not the same reason for requiring the charge to be reduced to

Opinion of McArthur, J., dissenting.

writing previous to such preliminary examination, as for requiring it in cases where the hearing is to be followed by final judgment, and I think our statute is in conformity with the general course of practice in the United States in failing to require a written complaint before the nature of the transaction is ascertained from the examination.

This being the rule prescribed by statute, it is not necessary to the jurisdiction of the committing magistrate that there should be a written complaint charging the crime with that certainty that is required in an indictment, and this Court would not be justified in assuming that under proper allegations the plaintiff must fail for want of proof. The question is not before us, and this Court does not, at the present time, undertake to determine in what manner the jurisdiction of the committing magistrate may be proved on the trial, nor do I wish to be understood as expressing an opinion on the questions whether a written complaint or an order holding a defendant to answer, couched in the terms set forth in the complaint, ought to be received as proof on the trial. The demurrer must be sustained on the ground that the complaint fails to show that the prisoner, for whose release the undertaking was given, was charged with crime.

For reasons above stated, the cause will be remanded, that the respondent may have an opportunity to make such application to the Circuit Court as he may deem proper.

MCARTHUR, J., dissenting:

I am unable to concur with the views expressed and the conclusion reached by my brethren upon the second point discussed in the opinion just read by the Chief Justice. Assuredly the undertaking of bail was a contract, and one, too, which must be construed most strongly in favor of the State, and the parties signing the same must strictly comply with its terms. (*Barney v. Newcoln*, 9 Cush. 56; *Champlain v. The People*, 2 N. Y. 82.)

I am of opinion that it is not necessary, in order to create a liability, that the crime for which a person is admitted to bail be set forth or described in the undertaking of bail

Opinion of McArthur, J., dissenting.

with the same exactness as is required in an indictment or a commitment, and that it is sufficient if the same is referred to in general terms. (*State v. Marshall*, 21 Iowa, 143.)

What is the object of an undertaking of bail? Certainly not to charge a person with a crime for the purpose of entering upon an examination therefor, but simply that the sureties will secure the attendance of the party in conformity with the terms of their contract.

It is said that "one branch of the facts necessary to constitute the cause of action is that the defendant Wells was before a magistrate charged with a crime, that an examination was had, and that he was held to answer;" and it is obvious that the complaint is held insufficient upon the assumption that it does not show that Wells was charged with the commission of a crime. The undertaking recites, and the complaint, following the written instrument, alleges, that Wells was held to answer "on a charge of shooting and killing James Dennis." I am wholly satisfied that "shooting and killing" and "homicide" are convertible terms. Of course I concede that an indictment charging Wells with simply "shooting and killing James Dennis," without other allegations of intent, malice, etc., would be insufficient. But the case in hand is not that of an indictment. Wells was before the magistrate for examination, and that officer, having sufficient cause to believe that he had shot and killed James Dennis, held him to answer and admitted him to bail.

The rules governing common law recognizances are from analogy applicable to these statutory undertakings, and at common law it was only necessary to set out in the recognizance the kind or class, and not the particular degree of the crime for which the party was to answer. (1 Stew. and Port. 465; *Simpson v. Commonwealth*, 1 Dana, 523; *Commonwealth v. West*, Id. 165.)

I cannot appreciate the force of that reasoning which enables a surety to avoid his liability upon an undertaking, after default of the principal, upon the ground that the crime is not set out technically, when our statute itself only

requires a brief statement of the nature of the crime to be inserted in the undertaking. (Crim. Code, § 267.)

The contract was a voluntary contract. By it the sureties became the friendly jailers of the principal. It stands on its own terms, and is independent of any previous proceedings. (*McCarty v. The State*, 1 Blackford, 339.) I have already stated its object, and, in construing it, that object should certainly not be lost sight of. (*Blossom v. Griffin*, 13 N. Y. 569; *Atwood v. Cobb*, 16 Pick. 229.)

It seems to me that the whole case turns upon the solution of the question whether in using the words "shooting and killing," the draftsman filled the measure of the statute, which provides that in an undertaking of bail the crime may be briefly described or generally designated. If "shooting and killing" is not a crime, if the words do not describe a crime generally, the allegation in the complaint predicated thereon is insufficient and the demurrer is well taken, otherwise not. •

I have said that "shooting and killing" and "homicide" are convertible terms. In 1 Hawkins, Pleas of the Crown, ch. 8, § 2, homicide is described to be "the killing of a man by a man." Wells shot and killed Dennis; therefore, Wells committed homicide. Is homicide a crime? From the time of Sir Michael Foster, who first collected and systematized the principles of the modern law of homicide, down to the present day, the law has been, and now is, that every killing of a human being is presumed to be unlawful. (Hawkins, vol. 1, ch. 21, § 32; Gilbert, Ev. 234; Blackstone, 4 Com. 201; Phillips, 1 Ev. ch. 10, § 2, and Greenleaf, 1 Ev. § 34.) Even Bishop (2 Cr. Law, § 616 *et seq.*), admits this to be the undoubted law. Nor are we left to the text writers alone; the reports are full of cases directly and emphatically in point. In *State v. Anderson* (2 Tenn. 6), the broad doctrine is laid down that homicide is presumed to be murder unless extenuating circumstances are shown. In the celebrated Selfridge case Ch. J. Parker told the jury that when a homicide is committed the law implies malice. In *People v. McLeod* (1 Hill, 377-436), it was held that "all homicide is presumed to be malicious, and, therefore, mur-

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der, until the contrary appears from evidence." In *Hill v. Commonwealth* (2 Gratt. 594), the law was laid down to be that every homicide was *prima facie* murder; so also in *Choice v. The State* (31 Geo. 424, 464), and *Clarke v. The State* (35 Geo. 75). The same rule was held in a late capital case in England. (*Regina v. Maloney*, 9 Cox, Cr. Ca. 6.) The presumption that all homicide is unlawful prevails in Ohio (*State v. Turner*, 1 Ohio St. 422, and *State v. Town*, Id. 75); in Mississippi (*Hogue v. The State*, 34 Miss. 616); in Illinois (*Murphy v. The People*, 37 Ill. 447); in Minnesota (*The State v. Shippey*, 10 Minn. 223); in Kentucky (*Smith v. Commonwealth*, 1 Duvall, 224); in Pennsylvania (*Cathcart v. Commonwealth*, 37 Penn. 108; *Coin v. Drum*, 58 Penn. 9). It is useless to multiply citations; even a cursory examination will show that the whole current of authorities supports the proposition.

I am aware that the force of some of the authorities cited is broken by the provision of our Criminal Code, § 519, which provides that "there shall be some other evidence of malice than the mere proof of killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony." In this State the mere fact of killing does not raise so strong a presumption of malice as to warrant a conviction of murder in the first degree, but it may warrant a conviction of murder in the second degree, or of manslaughter.

For the foregoing reasons I think the judgment of the Court below should be affirmed.

AUGUST DERKENY, APPELLANT, v. LOUIS BELFILS,
RESPONDENT.

INSTRUCTIONS.—Where issue is joined on the merits in an action for goods sold and delivered, it is error to instruct that if the plaintiff had sold the demand before the commencement of the action he cannot recover.

APPEAL from Benton County.

The facts are stated in the opinion of the Court.

4 258
20 599
26* 849

4 258
25 108
34* 1027
4 258
46 242
47 86

Opinion of the Court—Upton, C. J.

John Kelsay and R. S. Strahan, for Appellant.

John Burnett and W. W. Thayer, for Respondent.

By the Court, UPTON, C. J.:

This appeal is from a judgment of the Circuit Court for Benton County, rendered in favor of the defendant in an action for goods, wares and merchandise sold and delivered.

The answer denies the sale and delivery of the goods, but alleges that the defendant received of the plaintiff certain goods to be sold by the defendant, and to be paid for by him as fast as he should sell them; and alleges that the defendant retained the privilege of returning to the plaintiff any of the goods remaining unsold whenever the defendant should demand a return. The replication denies that the goods mentioned were received by the defendant upon the terms set forth in the answer, and puts in issue all the affirmative allegations of the answer.

The record contains several assignments of error, but the only assignment it is necessary to notice here is the exception taken to an instruction to the jury, to the effect that if the jury found from the evidence "that the plaintiff sold the account sued on before the commencement of this action, and that the same had not been purchased back by him, the verdict must be for the defendant." The Circuit Court, by giving this instruction, authorized the jury to determine the controversy upon a question of fact not put in issue by the pleadings, and this Court cannot assume, if the instruction was improperly given, that the error did not affect a substantial right of the plaintiff.

The distinction between pleas in abatement and defenses in bar of the action has been recognized and sustained in this State constantly since the subject first came before this Court in the case of *Hopwood v. Patterson* (2 Ogn. 49), where it was held that answers in the nature of pleas in abatement should be pleaded separately, and be disposed of before an answer to the merits is considered. We cannot sustain the position taken by the respondent in this case unless we not only disregard the rule laid down in that

 Points decided.

case, but go further and hold that one who has pleaded to the merits may have all the advantages of a defense in abatement of the action without having plead in abatement or in any manner apprised the plaintiff of the defendant's intention to contest the plaintiff's right to sue upon the demand.

The respondent urges that objections to the competency of evidence cannot be raised for the first time in the Appellate Court, and that no objection was made to the introduction of evidence tending to show that the plaintiff had sold the *chose in action* upon which he sues. The bill of exceptions is silent as to whether such evidence was introduced, and we cannot assume error, in support of the verdict and judgment, that irrelevant testimony had been received without objection, and that the plaintiff had thus waived his right to except to the instructions. For aught that is disclosed by the record, the error was committed without any fault or negligence of the plaintiff.

The error disclosed was not only calculated to affect a substantial right, by diverting the attention of the jury from the questions they were called to try, but it was calculated to place the plaintiff in the attitude of being bound by a final judgment on the merits, when the fact found could properly have no greater effect than that of abating the action.

[The judgment of the Court below was reversed, and a new trial ordered.—REP.]

R. H. MOORE, APPELLANT, v. S. F. FLOYD ET AL.,
RESPONDENTS.

JUDGMENT.—A party cannot claim the benefit of a judgment, and at the same time appeal from it.

APPEAL from Jackson County.

The facts are stated in the opinion of the Court.

J. F. Watson, and Thayer & Williams, for the motion.

4	280
10	280
4	280
24	57
32*	785
4	280
28	97
4	280
37	324

Points decided.

B. F. Dowell and W. R. Willis, contra.

By the Court, McARTHUR, J.:

At the November term, 1871, of the Circuit Court for Jackson County, in an action at law, Moore obtained a verdict and judgment against the respondents for five hundred dollars, and costs and disbursements duly taxed. Upon the trial certain exceptions were reserved, and the bill thereof was allowed and signed December 12, 1871. On January 2, 1872, the judgment, costs and disbursements were paid, and full satisfaction thereof was entered on the margin of the journal by Kelly, one of Moore's attorneys. On May 17, 1872, Moore, by his attorney, B. F. Dowell, filed notice of appeal to this Court, which notice was duly served.

Upon this state of facts we are of opinion that Moore waived his right to appeal. A party cannot claim the benefit of a judgment, and at the same time appeal from it. (*Kelly v. Bloom*, 17 Abb. Pr. 229.) The right to proceed on the judgment and enjoy its fruits, and the right of appeal, are not concurrent; on the contrary, they are totally inconsistent. An election to take one of these courses was, therefore, a renunciation of the other. (*Bennett v. Van Syckel*, 18 N. Y. 484.) The election was made when the amount of the judgment, costs and disbursements was accepted and satisfaction thereof entered. In this case the judgment became a dead record long before the notice of appeal was filed, and was not, nor could it be revived by the filing thereof. The motion must be granted, and the appeal dismissed.

Appeal dismissed.

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15 417
20 180
15* 661
25* 380

**WILLAMETTE FREIGHTING COMPANY, RESPONDENT,
v. SAMUEL STANNUS, APPELLANT.**

ASSESSMENTS OF STOCK IN PRIVATE CORPORATION.—When a sufficient amount of the capital stock of a private corporation has been subscribed to authorize the stockholders to proceed to the election of Directors, after the election thereof assessments may be legally made upon the unpaid stock so subscribed, and this though the corporation has increased its

Statement of Facts.

capital stock and the entire amount of the shares of the original stock and of the increased stock has not been subscribed. It is otherwise, where subscription to the entire number of the shares of the original as well as any contemplated increase of stock has been made a condition precedent to the exercise of the power of levying assessments.

STOCKHOLDERS MAY BECOME LIABLE BEFORE THE WHOLE AMOUNT OF STOCK IS SUBSCRIBED.—Stannus subscribed for and took twenty shares of stock in a private corporation, and promised to pay the company therefor at the rate of fifty dollars per share in gold coin. The only conditions upon which the subscription was made were those contained in the articles of incorporation and the by-laws and in the instrument signed by subscribers to the stock, which "provided only that no assessment upon the shares subscribed should become due prior to the first of April, 1870," all the assessments having been made subsequent to that time. *Held*, that his liability to pay for the shares so subscribed was not upon condition that he should not become liable until the whole stock was subscribed. *Held, also*, that the doctrine "that a subscription for stock in a corporation whose capital stock is fixed at a certain amount, or is to be determined by the Directors, is conditioned that the subscribers shall not become liable until the whole stock is subscribed," cannot apply in this case, for the proportion of stock necessary to be subscribed before the election of Directors, or rather before the organization of the company, was duly subscribed and taken before the business of the company was proceeded with.

IDEM.—Subscription to the entire amount of stock of a corporation is not a condition precedent to legal corporate existence in this State. The doctrine that whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its Board of Directors, the power to levy assessments, is in harmony with the general incorporation laws of this State.

DENYING LEGALITY OF ASSESSMENTS—STOCKHOLDERS, WHEN ESTOPPED.—Where assessments upon stock were levied by the stockholders by virtue of a by-law framed and adopted by the stockholders, a stockholder who assisted in framing the by-law and gave his voice for its adoption, is estopped from questioning the legality of the assessments.

APPEAL from Benton County.

This action was instituted by the Willamette Freighting Company, a private corporation organized under the general incorporation law of this State, to recover from Samuel Stannus the aggregate amount of five separate assessments upon twenty shares, valued at one thousand dollars, of the capital stock of the company, which shares Stannus subscribed for and agreed to take. The complaint alleges that the respondent, who was plaintiff in the Court below, is a corporation, duly organized under the laws of this State on

Statement of Facts.

March 16, 1869. That the enterprise in which it proposed to engage was the navigation of the Willamette River and its tributaries. That on March 31, 1869, the appellant, who was the defendant in the Court below, executed with certain other persons the following instrument in writing, viz.: "We, the undersigned, and each of us, do hereby subscribe for and take the number of shares set opposite our respective names, of the capital stock of the Willamette Freighting Company, of Benton County, Oregon, and undertake and promise to pay to said company therefor, in United States gold or silver coin, the sum of fifty dollars per share—the capital stock of said company being represented by three hundred shares, and each share representing the sum of fifty dollars; and we subscribe for and take said stock on the terms, conditions and limitations set forth in the articles of incorporation and by-laws of said company; *provided only*, that no assessment upon the shares subscribed shall become due prior to April 1, A.D. 1870."

Subscribed:

"Samuel Stannus, twenty shares, \$1000;" and divers other persons.

That the defendant became thereby a subscriber for twenty shares of said stock, and a stockholder in the corporation; that the only provision of the company, in regard to the assessment of the stock, is Article 10 of the By-Laws, which provides as follows:

"ARTICLE 10. All assessments exceeding ten per cent. on the capital stock shall be made at a regular meeting of the stockholders, or a special meeting, and it shall require a majority of all the stock or shares to form a quorum to do any business required to be done by virtue of this organization (votes by written proxy being allowed); *provided*, that the directors are hereby authorized to make assessments, not exceeding ten per cent., on the capital stock of the company."

That in pursuance of the articles of incorporation, the by-laws, and the said agreement, the plaintiff, at regular

Statement of Facts.

meetings of the stockholders and directors, at which the defendant was present and assented, duly levied assessments from time to time upon the capital stock of said company, and that the aggregate amount thereof upon the shares of the defendant was six hundred dollars, which he became liable to pay, but of which sum he has paid only fifty dollars. The complaint also sets out three assessments made by the directors of the company, aggregating twenty-five per cent. of the stock, and two made by the stockholders, aggregating thirty-five per cent.

The answer denies every material allegation of the complaint, except that the defendant signed his name to the agreement referred to, and placed twenty shares opposite thereto. The answer then sets up, as a further defense, that on January 22, 1870, at a meeting of the stockholders of the company, called and held at the town of Monroe, in Benton County, for that purpose, they (the stockholders) by a vote of a majority of the stock, increased the capital stock to \$50,000. That thereafter, and ever since, the capital stock of the Willamette Freighting Company has been and is \$50,000, which amount has never been subscribed for or taken. That not exceeding \$19,000 of the stock has been subscribed for or taken; and that during all the time the said pretended assessments were made, the capital stock of the company was untaken and unsubscribed for. That said pretended assessments were all attempted to be made for the general objects and purposes of the plaintiff, to wit, the construction of the necessary boats to navigate the Willamette, Long Tom and other tributaries of the first-named stream, from Portland to Eugene City.

The reply admits that the capital stock of the company was increased on January 22, 1870, at a stockholders' meeting, to \$50,000; and that, at the time the several assessments mentioned in the complaint were levied, the capital stock was \$—; and that not exceeding \$19,000 of the same had ever been subscribed for or taken; and that the alleged assessments were made for the general objects of the company.

The trial in the Court below resulted in a verdict for the

Argument for Appellant.

plaintiff, upon which a judgment was rendered. The defendant appeals from said judgment, and assigns numerous errors. The errors relied upon are stated in the opinion of the Court.

R. S. Strahan and John Kelsay, for Appellant.

The stockholders had no power to make assessments upon the stock. (Mis. Laws, ch. 7, §§ 5, 9; *McCullough v. Moss*, 5 Denio, 567, 575, 584; 19 N. Y. 216; Angell and Ames on Cor. 266, § 279; Abbott's Dig. Laws of Cor. 25, § 7; 568, § 1; 569, § 14.)

The powers of all corporations are to be strictly construed. What is not expressly granted is withheld. (Sedg. on Con., etc. 338; 11 Pet. 420; 9 How. U. S. 184; and 2 Black. 723.)

Capital stock must be subscribed before the corporation can go forward with its general business. (Session Laws 1868, § 6, p. 179; 9 Pick. 187; 6 Gray, 87; 10 Pick. 142; 10 Foster, 390; and 32 N. H. 363.)

The by-laws were made by the stockholders, and being without power to make them and all assessments being predicated thereon, the whole are without authority of law and are void. See the authorities cited on the first point.

The subscription must be construed as if all the provisions of the statute affecting the liability of the subscriber were incorporated in his agreement. (2 N. Y. 335; 17 Barb. 581; 1 Green's R. 13; Abb. Dig. Laws of Cor. 169, § 205; 15 How. Pr. 209, 210.)

Where the number of shares of a corporation is fixed, either by its charter or its own vote, no stock is valid till the whole is subscribed for. (5 Pick. 23; 14 N. H. 543; 2 Gray, 277, 278; 6 Cush. 50; 9 Cush. 423 *et seq.*; Angell & Ames on Cor. §§ 543, 544; 10 Mass. 384; 6 Gray, 87, 88; 8 Cush. 110 *et seq.*; 45 Maine, 524; Abb. Dig. Laws of Cor., p. 26, § 22; 9 Pick. 195 *et seq.*; 39 Maine, 571.)

It was error to instruct the jury that the plaintiff was entitled to recover for all legal assessments. (Session Laws 1868, 154, § 198; 20 N. Y. 129, 130.)

Plaintiff should have proved demand before instituting the action.

Opinion of the Court—McArthur, J.

F. A. Chenoweth, W. W. Thayer, and John Burnett, for Respondent.

A corporation in this State has a right to increase or diminish its capital stock or the amount of the shares thereof. (Mis. Laws, ch. 7, § 19.)

Whenever a corporation is capacitated to prosecute its business, it has the right to levy assessments. (*H. & D. P. R. Co. v. Rice*, 7 Barb. 157; 21 Barb. 56; 11 N. Y. 102; 16 N. Y. 457; 18 Ind. 452; 34 Maine, 360 *et seq.*; 40 Id. 172; 41 Id. 572.)

As appellant assisted in making the by-laws, and as he subscribed for stock upon the terms referred to therein, he should not be heard to complain.

No demand was necessary before action brought. (Abbott's Dig. Laws of Cor., §§ 258, 259.)

A stockholder may waive a condition, upon the observance of which he might have insisted, and thereby estop himself to question an irregularity. (Abbott's Dig. Laws of Cor., §§ 58, 59; 31 Barb. 323; 35 Mo. 26, 27.)

By the Court, McARTHUR, J.:

When the Willamette Freighting Company was organized the capital stock was fixed at thirty thousand dollars. No question is made but that, of this amount, fifteen thousand dollars were subscribed and taken before the Company increased its capital stock to fifty thousand dollars. We are led, therefore, to conclude that such was the fact, and it is alluded to at this time as it has an important bearing in considering the legality of the increase of the capital stock. By virtue of the proviso in § 6 of the Act in relation to private corporations (Mis. Laws, ch. 7), it is lawful for such corporations to proceed to elect directors after one-half of the capital stock has been subscribed. After this important step is taken the organization of the corporation is so far complete as to enable the Board of Directors to proceed with the transaction of any and all business, always of course being controlled by the articles of incorporation, the by-laws, and the character and neces-

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sities of the enterprise. The Board of Directors, when once legally elected, may proceed to levy assessments, increase or diminish the capital stock, and do any other act necessary to promote the object of the corporation. (Mis. Laws, ch. 7, § 19.) In this case the proportion of the capital stock required by law had been duly subscribed, and the Board of Directors legally elected; they were, therefore, invested with full authority to increase the capital stock, and the assessments which it levied were legal and binding upon the subscribers to the original stock. If an incorporation sees fit to increase its capital stock, it is not necessary to wait until all the shares of the original stock, and of the increased stock also, are subscribed and taken before assessments can be levied upon the shares of the original stock which have been subscribed for. Of course the subscription to the entire number of shares of the original, as well as any contemplated increase of stock, can be made a condition precedent to the exercise of the power of levying assessments. In this case there was no agreement or stipulation to that effect. The subscription of Stannus was absolute. He subscribed for and took twenty shares of stock, and promised to pay the Company therefor at the rate of fifty dollars per share in gold coin. The only conditions upon which the subscription was made were those contained in the articles of incorporation and the by-laws, and in the instrument signed by those subscribing to the stock, which "provided only that no assessment upon the shares subscribed shall become due prior to the first of April, 1870." All the assessments having been made subsequent to that time, there was, of course, no violation of this proviso. We are aware of the full import of the authorities cited from Massachusetts. It is held there that a subscription for stock in a corporation whose capital stock is fixed at a certain amount, or is to be determined by the Directors, is conditioned that the subscriber shall not become liable until the whole stock is subscribed. This rule places the Directors in such a position as to prevent them from transacting any business until all the stock is subscribed. This doctrine cannot apply in

this case, for, under our statutes, the proportion of stock necessary to be subscribed before the election of the Directors, or rather before the organization of the Company, was duly subscribed and taken before the business of the Company was proceeded with. The general principle, that a subscription of the whole amount of stock is not a condition precedent to legal corporate existence, except when made so by general statute or expressed in the charter (4 Eng. L. and Eq. 455), is recognized in Massachusetts (6 Pick. 23; 9 Id. 187; 10 Id. 142); and this fact furnishes incontestable proof that the Massachusetts rule invoked by appellant's counsel grew out of legislative enactment. Its application is not universal, but is limited to those States whose legislation is of like character. The doctrine that whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its Board of Directors, the power to levy assessments (*S. & S. P. R. Co. v. Thatcher*, 11 N. Y. 107), is in harmony with the general incorporation laws of this State. We are of opinion, therefore, that the assessments levied by the Board of Directors upon the stock subscribed for by Stannus, were valid and lawful, and that the increase of the capital stock of the Company in no way prejudicially affects the right of the Company to maintain this action. The right of action of the Company is based upon the original contract, which, as has been before stated, was absolute. (*H. D. P. R. Co. v. Rice*, 7 Barb. 164; *S. & S. P. R. Co. v. Thatcher*, 11 N. Y. 107.)

It appears that two assessments, aggregating thirty-five per cent., were levied by the stockholders by virtue of Article 10 of the by-laws. These by-laws were framed and adopted by the stockholders, and Stannus assisted in framing them and gave his voice for their adoption. It is urged that the law in relation to corporations must be strictly construed; that as these assessments were not made by the Board of Directors they were illegal, and that they derive no legality or validity from the by-law authorizing stockholders to levy certain assessments, for that by-law itself is violative of the statute which places the control of the

Points decided.

affairs of the Company in the hands of the Board. It will not be denied at this day that it is the duty of Courts to strictly construe the law touching the rights, duties and obligations of corporations in all cases arising between corporations and third parties, and in very many cases arising between corporations and individual stockholders. But it is not always that such construction can be insisted upon by the stockholder in an action by or against a corporation. When a corporation is organized, the principles of the law of partnership may in very many respects be held to govern the stockholders in their conduct in respect to each other and in respect to the corporation. (31 Barb. 323; 35 Mo. 26, 27.) The bill of exceptions shows that Stannus was a stockholder in the company, and that he was one of the principals of the enterprise. He assisted in making the by-law by virtue of which these assessments were levied by the stockholders, and now seeks to avoid its effect, and insists upon his right to have the statute strictly construed. We are of opinion that he is not in a position to justly ask for that strict construction. He had a right to waive, and did waive the condition fixed by law that the Directors must make all orders levying assessments, and by his acts he has estopped himself to question any irregularity in the levying of the assessments of which he complains.

We do not think it necessary to pass upon the question of demand and notice as presented.

Judgment affirmed.

PATRICK FARLEY ET AL., PLAINTIFFS AND RESPONDENTS, v. P. C. PARKER AND J. F. SUTHERLAND, DEFENDANTS AND APPELLANTS.

BURDEN OF PROOF.—In an action to recover real estate, where plaintiffs allege title in themselves, and this allegation is denied in the answer of the defendant, the *onus probandi* is upon the plaintiffs to show title in themselves.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

Opinion of the Court—Prim, J.

W. W. Thayer, for Respondents.

W. R. Willis and A. C. Gibbs, for Appellants.

By the Court, PRIM, J.:

This was an action at law in the Circuit Court of Douglas County to recover the possession of a certain piece of real estate.

The plaintiffs alleged in their complaint that they were the heirs of Michael Farley, deceased, and as such were the owners in fee of the one undivided sixth of the premises described in their complaint, and that the defendants wrongfully detained the same from their possession.

One of the defendants (C. P. Parker) filed a separate answer, in which he denied that the plaintiffs were the owners in fee of the premises described, or that they were entitled to the possession thereof. Defendant, for further answer, alleged the title and the right of possession to the premises in dispute to be in himself, which was put in issue by the replication of the plaintiffs. The other defendant filed a disclaimer, and the action was dismissed as to him.

At the trial the plaintiffs offered in evidence a patent certificate to the premises in dispute, issued to Michael Farley by the Register and Receiver at Roseburg, Oregon.

One of the plaintiffs (Thomas Farley) was sworn as a witness on behalf of the plaintiffs, who testified that the plaintiffs were the brothers and sisters of Michael Farley, who died without leaving either wife, children or father.

Plaintiffs having rested, the defendant produced in evidence a deed from Michael Farley to E. Colvin, also one from E. Colvin to Thomas S. Colvin, both of which were duly executed and recorded. Other deeds were then offered by defendant to complete his chain of title; but two of them were defective,—one of them failing to include the land in dispute, and the other having but one witness.

The defendant having rested, plaintiffs offered some evidence in rebuttal, tending to show the insanity of Michael Farley at the time of executing the deed to E. Colvin.

Points decided.

The Court instructed the jury that, "under the pleadings, the defendant must show title in himself, and, having failed to do so, they must find a verdict for plaintiffs." This instruction, we think, was erroneous, and calculated to mislead the jury.

The plaintiffs having alleged title in themselves, and this allegation having been denied in the answer of defendant, the *onus probandi* rested on the plaintiffs instead of the defendant; therefore, under the pleadings, it was incumbent upon the plaintiffs to prove title in themselves before they could recover in the action. It further appears from the bill of exceptions, that the Court prepared the verdict for the jury, and then called upon one of them to sign it as foreman, who did so. The Court then said to them: "Gentlemen of the Jury, I instruct you that this is your verdict."

It was undoubtedly proper that the Court should instruct the jury, that if they found for the plaintiffs, what should be the form and substance of the verdict; but we think the instruction given was entirely too strong.

We deem it unnecessary to look into the other questions raised in the record, upon the admission of certain evidence tending to show the insanity of Michael Farley, as we think the case should be reversed and a new trial granted on account of the instructions already alluded to.

It is, therefore, ordered that this cause be reversed, and remitted to the Court below for a new trial.

A. P. ANKENY, APPELLANT, v. MULTNOMAH
COUNTY, RESPONDENT.

INDEBTED WITHIN THE STATE.—WHAT CONSTITUTES, WITHIN THE MEANING OF THE STATUTE.—That part of the Act of December 19, 1865, which declares, "It shall be the duty of the Assessor to deduct the amount of indebtedness within this State, of any person assessed, from the amount of his or her taxable property, given under oath," construed. *Held*, 1. That there is an ambiguity in the language of the Act requiring judicial construction; 2. That the language "indebtedness within this State," has reference to the *locus in quo* of the creditor, rather than the place of the payment of the debt; 3. That although the debt sought to be deducted from the value of taxable property may have been contracted

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and made payable within this State, and although the creditor, at the time the debt was contracted, resided therein, yet if, at the time of the assessment, the creditor is a non-resident of the State, the indebtedness cannot be deducted.

APPEAL from Multnomah County.

An assessment for the year 1871 was duly levied upon the property of A. P. Ankeny, the appellant, a resident of Multnomah County, consisting of lots in the city of Portland, valued at \$8050. Ankeny was indebted to one Jemima Wheeler upon a promissory note for \$15,000, executed in Portland, and made payable there, secured by mortgage on a portion of said lots. At the date of the loan, and for some time prior thereto, said Wheeler resided in Multnomah County; but at the time the assessment was made and the subsequent proceedings relating thereto were had, her residence was to Ankeny unknown. She was reported to have gone to Washington Territory, whether for permanent residence or not does not appear. Ankeny sought to have his said indebtedness deducted from his assessment. The Assessor refused to allow the deduction to be made. The application having been renewed before the County Court for Multnomah County, sitting as a Board of Equalization, was again refused. These proceedings of the County Court were certified to the Circuit Court on a writ of review, and were there affirmed. From the decision of the Circuit Court, affirming the action of the County Court, this appeal is taken.

Shattuck & Killen, for Appellant.

Addison C. Gibbs, for Respondent.

By the Court, BONHAM, J.:

This case simply involves a question of statutory construction.

The language of the Act of December 19, 1865 (Mis. Laws, ch. 57, § 16), authorizing the deduction of indebtedness from the assessed value of taxable property, is as follows: "It shall be the duty of the Assessor to deduct

the amount of indebtedness, within this State, of any person assessed, from the amount of his or her taxable property given under oath."

It is claimed, by counsel for appellant, that the question whether the indebtedness is within the State is determined by the place of payment. That it having been agreed, in this case, that the indebtedness of Ankeny to Wheeler was payable at the city of Portland, therefore it was an *indebtedness within this State*, and should have been deducted from his assessment. On the other hand, counsel for respondent claims that whether the debt be *within the State* or not, depends on whether the creditor *resides in the State*.

It is claimed, by counsel for appellant, that the language of the statute, "indebtedness within the State," is so plain and conclusive that it is not susceptible of the construction claimed for it by respondent's counsel, without an invasion by the Court of the prerogative of the lawmaking power.

It is conceded, however, by counsel for appellant, that if the statute read, "indebtedness *to persons* within the State," then respondent's construction would be correct; and it might, we think, with equal propriety, have been admitted, by counsel for respondent, that if the statute read "indebtedness *payable* within the State," that then the construction claimed by counsel for appellant would be correct. But, unfortunately for those who are called upon to incur the expense of finding out what the Legislature did mean, the restrictive words above suggested were not used by our lawmakers, which, if they had been, would have placed the language of the statute beyond the necessity of judicial construction.

It is a well-settled rule of statutory construction that such meaning is to be attached to the language of the lawmaker (especially in the case of remedial statutes), as will effectuate the object and purpose of the law. And we cannot agree with counsel for appellant that the meaning of this statute, as held by the County and Circuit Courts for Multnomah County, was not a legitimate exercise of judicial construction. It is true that it is the duty of Courts to determine the intention of the Legislature from the fair import

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of the words of the statute, and not to presume or conclude that something was intended which the language of the law does not warrant. Yet it often occurs from the hasty action or inadvertence of the lawmaker that language is employed which is more or less ambiguous; and it then becomes the duty of the Courts to determine, by the established rules of statutory construction, what was intended.

Chancellor Kent, in discussing this subject, says (1 Kent's Com. 11th edition, p. 501): "The true meaning of the statute is generally and properly to be sought from the body of the Act itself. But such is the imperfection of human language and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions arising from the ambiguity that attends them. It requires great experience as well as the command of perspicuous diction, to frame a law in such clear and precise terms as to secure it from ambiguous expressions, and from all doubt and criticism upon its meaning."

And the same author further says (Id. 502): "It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. * * * When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the objects and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion."

See, also, *People v. Utica Ins. Co.* (15 Johnson, 357), and *Whitney v. Whitney* (14 Mass. 92).

So far then as the specific directions of a statute are clouded by ambiguity, it is the province of the Courts to determine, from the general import of the language used, and the obvious intention of the lawmaker, what was intended in any given particular. In this case, in speaking of "indebtedness within the State," our lawmakers omitted

to express directly whether they meant indebtedness *to persons* within the State, or indebtedness *payable* within the State.

Now, in order to ascertain the true meaning of the words of the statute employed as referred to, let us inquire what was the obvious intent and object of the Legislature in passing the Act of December 19, 1865. The only rational object, and the only one that we have the right to presume was had in view by the Legislature, was the important and equitable consideration of the equalization of taxes. This the Constitution of the State requires of the Legislature, wherein it says (Bill of Rights, § 32), "All taxation shall be equal and uniform." The presumption in the absence of proof to the contrary is, that all officers do their duty. It was and is the duty of the Legislature as far as practicable to see that "all taxation shall be equal and uniform;" hence that must have been their object in passing the law authorizing the deduction of indebtedness within the State from the value of taxable property therein.

If A. buys a tract of land of B. for \$5000, and not having the means to pay for it, executes to B. his note secured by mortgage on the land for the purchase price, to require that A. should be taxed for the land, and that B. should be taxed on his note and mortgage, would virtually be a double assessment of the same property. And inasmuch as B.'s note and mortgage are taxable, and A. does not absolutely own any property, because his creditor B. has a lien upon it for its whole value, it would be making taxation equal and uniform to exempt A. and require B. to pay the tax. But again, as a safeguard to the State, the law must provide that the property shall be *once* taxed in every assessment year; because it is situated within the jurisdiction of the State, and is subject to protection by the law. Hence the creditor must be within the jurisdiction of the State, and liable to taxation to exempt the property of the debtor. This is in harmony with our *ad valorem* system of taxation, as well as with the provision of our State Constitution referred to. To hold that the debtor should be exempt when the creditor was a non-resident of the State (as was ad-

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mitted to be the fact in this case), would be to hold that the property might not be taxed at all.

But it may be said that, in this case, when the debt in question was contracted, Ankeny's creditor was a resident of the State of Oregon, and that he was not shown to be privy to the subsequent removal of Mrs. Wheeler from the State. To this we answer, that in a case of this kind, the creditor might be considered as the hostage of the debtor; and if the latter desires to avail himself of the benefits of the Act of December 19, 1865, he must see that his creditor remains within the jurisdiction of the State, or at least that he is there at the time of the assessment of the debtor. To give this law the construction claimed for it by counsel for appellant, would be to open a door to fraud, evasion and inequality in taxation, which experience teaches that it is the duty of the lawmaker to guard against.

For illustration, suppose again that A., being a resident of Marion County, where taxes are now twenty-five mills on the dollar, and, having property therein worth \$50,000, should conclude, just before the Assessor should come around, to borrow \$50,000 of his friend B., giving his note therefor payable at Salem, and with the understanding between debtor and creditor that the latter should remove temporarily from the State. By this transaction A. would realize the snug sum of \$1250, although B. might return to the State within a few days afterward and collect his \$50,000 from A. And such also would be the result if appellant's position be correct, if B. were, in the first place, a non-resident of the State.

It might be proper to remark, that the foregoing illustration was not suggested by the facts in this particular case, but it is given to illustrate the facility with which the spirit of the law might be evaded by an act of shrewd financiering, which it is to be feared would be too often resorted to if the law in question is to be construed as claimed by appellant.

We think that the language of the statute, "indebtedness within the State," has reference to the place of residence of the creditor rather than the place of the payment

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of the debt (*Johnson v. City Council of Oregon City*, 3 Oregon, 13); and that a debtor, at the time of his assessment, must be able to show that his creditor is a resident of the State in order to entitle him to the deduction of his indebtedness under the statute.

Judgment affirmed. _____

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STATE OF OREGON, RESPONDENT, v. THOMAS SLY,
APPELLANT.

JURISDICTION.—The Circuit Court has jurisdiction of the crime of assault and battery.

PLEA IN BAR TO INDICTMENT.—A conviction under a city ordinance for “disturbing the peace,” or for “fighting in the streets,” cannot be pleaded in bar to an indictment in the Circuit Court for the assault and battery committed at the same time. The two offenses are not identical.

APPEAL from Jackson County.

On December 20, 1870, Thomas Sly was tried and convicted before the Recorder of Jacksonville, for the offense of disturbing the peace, by fighting one John Pelling in the public street, in violation of a certain duly adopted ordinance of said city. He was fined ten dollars, which fine, together with the costs, he paid. Afterwards, at the November term of the Circuit Court of the State of Oregon for the County of Jackson, he was indicted for an assault and battery—the indictment charging that on December 20, 1870, he did assault and beat one John Pelling. Upon this indictment he was convicted and fined in the sum of ten dollars. From said judgment of conviction Sly appeals.

B. F. Dowell and John Kelsay, for Appellant.

J. R. Niel, District Attorney, and J. H. Stinson, for Respondent.

By the Court, McARTHUR, J.:

The question as to the jurisdiction of the Circuit Courts over the crime of assault and battery must, we think, be answered in the affirmative. Section 537 of the Criminal

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Code, which took effect from and after May 1, 1865, made the crime of assault and battery indictable in the Circuit Courts, and punishable by imprisonment in the county jail not less than three months, nor more than one year, or by fine not less than fifty nor more than five hundred dollars. By § 2, Subd. 2 (Code of Procedure in Justices' Courts, ch. 1, § 2) of the Act regulating the civil and criminal procedure in Justices' Courts, which Act went into operation May 1, 1865, jurisdiction of the crime of assault and battery, not charged to have been committed with intent to commit a felony, was also given to the Justices' Courts. The jurisdiction was therefore concurrent in all cases of assault and battery not charged to have been committed with intent to commit a felony. The sixth subdivision of the section last referred to, as amended in 1865, provided that in case of assault, and assault and battery, over which a Justice's Court had jurisdiction, the punishment should be by fine of not less than five nor more than fifty dollars. This amendment does not deprive the Circuit Courts of jurisdiction in this class of cases.

By virtue of the Act of the Legislature, incorporating Jacksonville, the common council was invested with the power to pass and enforce ordinances, punishing any and all parties who might disturb the peace by fighting in the streets, and we are of opinion that the judgment of conviction of the offense of fighting in the streets, or disturbing the peace, pronounced by the recorder under a city ordinance, cannot be pleaded in bar to an indictment in the Circuit Court, for the assault and battery committed at the same time; for the reason, that before a defendant can avail himself of the plea of *autrefois convict*, he must show the identity of the offense and of the person. (1 Chitty's Crim. Law, 462; *Wilson v. The State*, 24 Conn. 57; *Duncan v. Commonwealth*, 6 Dana (Ky.) 295; *Commonwealth v. Wade*, 12 Pick. 496; 4 Black. Com. 336.) The crimes, to be identical, must be the same in law and in fact. (*Commonwealth v. Roby*, 12 Pick. 502; *Commonwealth v. Bubser*, 14 Gray, 84.)

The offenses above referred to are not identical. The one is a violation of a police regulation of the municipality;

Points decided.

the other a violation of the criminal code of the State. Though the Recorder of Jacksonville is *ex officio* a Justice of the Peace, and might have proceeded under the State law to punish the appellant for the crime of assault and battery, yet it very plainly appears that he did not. He saw fit only to exert his authority as Recorder, and to punish him solely for the infraction of the city ordinance. Conceding, however, that the offenses are identical, that fact cannot in this case avail the appellant, for we deem the correct view of the subject to be that taken by the Court in *Shafer v. Mumma* (17 Md. 331), wherein it was held that the imposition of a fine by the mayor of a city in the exercise of his police power, will not relieve the offender from liability to the State. And this is analogous to the well-settled doctrine which holds an offender liable to be doubly punished, by the United States and by a single State, for an act violative of both a law of Congress and a State law. (*Fox v. Ohio*, 5 How. U. S. 410; *Moore v. Illinois*, 14 How. U. S. 13; *Levy v. The State*, 6 Ind. 281; *Waldo v. Wallace*, 12 Ind. 569; *Gardner v. The People*, 20 Ill. 430.)

It follows that the judgment of the Court below must be affirmed.

Judgment affirmed.

**ABRAM BLAKESLY AND THERESA BLAKESLY,
APPELLANTS, v. FRANCIS CAYWOOD AND J. C.
CAYWOOD, RESPONDENTS.**

THE DONATION ACT IS A PRESENT GRANT.—The language of the Donation Act of September 27, 1850, operated in favor of the actual settler, who was under no disability, as a present grant, and vested in the donee a legal title to the land before the issuing of the patent.

IDEM—DONEE TAKES UPON CONDITIONS SUBSEQUENT.—By the operation of the Donation Act the donee acquires the land in fee subject to the conditions specified in the Act. They are conditions subsequent, and it is in the power of the donee to render the estate absolute by performance of the conditions.

IDEM—GRANT IS NOT VOID WHERE ALIEN DIES BEFORE NATURALIZATION.—The proviso in the fourth section of the Act that no alien shall be entitled to patent until he becomes naturalized does not render the grant void upon the death of such alien without naturalization.

Argument for Respondents.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

John Kelsay, R. S. Strahan and Boise & Willis, for Appellants.

The Donation Law is in words of present grant. (2 Ogn. R. 266; 12 How. 75.)

Charles P. Matt, up to the time of his death, had complied with all the terms and conditions of the Donation Law. The widow and heirs in such case take the share or interest of the deceased in equal proportions. (Donation Law, § 4.)

The plaintiff, Theresa, was born in Oregon, December 26, 1849, and was and is a citizen of the United States. (1 Sandf. Ch. 583, 639; 1 Abbott's Dig. p. 63, § 11; 2 Kent's Com. 16.)

The widow and heirs, being citizens, could demand the patent without proof of their citizenship; they take as purchasers of the United States. (*Fields v. Squires*, Deady, 383; 2 Black. Com. 1.)

The Donation Law is to be construed liberally in favor of the grantees. (*Silver v. Ladd*, 7 Wallace, 224.)

Mallory & Shaw, for Respondents.

The latter clause of the first provision of § 4 of the Act of September 27, 1850, applies only to those aliens who made their declaration of intention after the passage of the Act. This proviso confers a special privilege upon the heirs which was not possessed by the ancestor; they could obtain patent without proof of naturalization.

Without a special provision the heir cannot take by descent a greater estate than the ancestor held. The ancestor, Matt, could take no title to the land until he produced record evidence of his naturalization. If that was necessary for him, it is necessary for the heirs to make the same showing.

The relation of the United States with Great Britain, growing out of the joint occupancy of the Territory of Oregon, did not tend to promote friendly feelings between the citizens of the two countries.

British subjects in Oregon had no sympathy with the United States Government, therefore it was not the policy of the United States to give them land. If the United States had bounties to bestow they proposed to make citizens, and not aliens, the recipients of them. Aliens then in the country would accept the grant and insist upon their loyalty to a foreign power. It was to deprive them of that right that this proviso was inserted into the fourth section. The debates in Congress, at the time the law was before it for its consideration, show what was intended by the language of the proviso. (Speeches of Humphrey Marshall, Samuel R. Thurston, James B. Bowlin and Willard P. Hall, Part 2, 1st Session, 31st Congress, Cong. Globe, 1078, 1080; Speech of Cyrus L. Dunham, Id. 1094; Marshall's Amendment, Id. 1095; Discussion on motion to strike out Amendment, Id. 1096; Speeches of Dawson, Douglas, Benton and Felch, Id. 1845, 1846.)

By the Court, UPTON, C. J.:

This is a suit to compel the defendants to convey to the plaintiffs a parcel of land claimed under the Donation Act of September 27, 1850. The defendants demurred to the complaint, stating as ground of demurrer that it does not state facts sufficient to constitute a cause of suit, and the Circuit Court having sustained the demurrer, the plaintiffs appeal to this Court.

The plaintiffs claim through Charles P. Matt, the father of the plaintiff, Theresa Blakesly, who settled upon the land in controversy in 1844, and continued to reside upon it with his wife until 1851, at which time he died intestate, leaving a widow and an only child—the plaintiff Theresa. The defendant claims under one G. W. Taylor, who entered upon the land after the death of Charles P. Matt, and has since obtained a patent for the land from the United States.

The complaint sets out fully the proceedings taken by Matt and by Taylor in their efforts respectively to obtain title from the Government, and the sufficiency of the pleading depends upon an alleged disability on the part of Charles P. Matt, and those claiming under him, to take and hold the

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lands as a donation. Charles P. Matt was not a native of the United States, and never became naturalized, but in the year 1849 he declared his intention to become a citizen, and his daughter, the plaintiff, is a citizen of the United States. The question of disability—the only controverted question in the case—rests upon the construction to be given to the several provisions of the Donation Act bearing upon the rights of aliens and those claiming under them. Section 4 of the Act specifies the qualifications of the donee in this respect, in the following language: “Being a citizen of the United States, or having made a declaration, according to law, of his intention to become a citizen, or who shall make such declaration on or before the 1st day of December, 1851.”

The same section contains the following:

“*Provided*, that no alien shall be entitled to a patent for lands granted by this Act, until he shall produce to the Surveyor-General of Oregon record evidence that his naturalization as a citizen of the United States has been completed. But if any alien having made his declaration of an intention to become a citizen of the United States after the passage of this Act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this Act, shall descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue.”

One of the principal inquiries involved in this case is whether this explicit declaration that no alien shall be entitled to a patent until he shall produce evidence of his naturalization, is to be regarded as annexing a condition to the estate granted, the breach of which will amount to a forfeiture and annul the grant. If by the terms of the Act nothing passed to the donee until the issuing of the patent, the subject would be easily disposed of; for in that case, denying a patent would be denying all right and interest in the land. If becoming a citizen was thus made a condition precedent, the proposed grant would become a nullity upon the death of the party without naturalization. But in this case, Charles P. Matt, being qualified as a donee

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within the terms of the Act, and being settled on the premises at the time, a present interest in the land passed directly to him by the terms, "there shall be and hereby is granted to every white settler or occupant of the public lands * * * having made a declaration, according to law, of his intention to become a citizen of the United States * * * now residing in said territory, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this Act, the quantity of one-half section, or three hundred and twenty acres of land." It is, I think, too well settled to be open to argument that in favor of the actual settler, who was under no disability, this language operated as a present grant, and vested in the donee a legal title to the land before the issuing of the patent.

The title thus conferred on the donee was encumbered with conditions and liable to be defeated by the failure of the donee to perform; but it was nevertheless a present grant vesting the title, notwithstanding the estate was upon conditions subsequent and might be defeated by non-performance; and we are to consider whether, by the terms of the grant, failure to become naturalized was such breach of a condition subsequent as to defeat the grant. Up to the last moment of the life of the donee the delay was no breach of condition, there being nothing in the Act requiring the donee to be naturalized within a specified time. On the contrary, the effect of naturalization would have been the same had it been accomplished on the last day of his life as if done at a former period; and had he complied with all other requirements of the Act and lived until the present time without becoming naturalized, all the right and interest in the land that were his immediately after the Act took effect would still be his. Should an alien so circumstanced become naturalized hereafter, the disability in regard to receiving a patent would thereupon disappear, and he would then stand in respect to the title and in respect to receiving a patent in the same position as a native citizen. It is clear, therefore, that during the lifetime of Charles P. Matt his rights were not divested because of his failure to become

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naturalized, and if the land has reverted to the Government, because of his failure, it reverted at his death. The donee in this case, although an alien, was within one of the classes of persons entitled, under the specifications of the Act, to take as a donee, and he was within the description of persons of whom it is enacted that if "either shall have died before patent issues, the survivor and children, or heirs, shall be entitled to the share or interest of the deceased." The land donated must be within that general provision, unless there is some special provision making the donee, who had before the passage of the Donation Act declared his intention to become a citizen, an exception to the general rule relating to the disposition of the property on the death of the donee.

There is, in the language first above quoted, a special provision in regard to aliens who made the declaration of intention *after* the passage of the Act, and it is a peculiar and noticeable feature of the provision that it omits to mention the survivor, and enacts that if one of that class "shall die before his naturalization shall be completed, the possessory rights acquired by him under the provisions of this Act shall descend to his heirs at law." No such special reference is made to the disposition of the property of those who had *previously* declared the intention. On the hearing it was argued that an inference arises from omitting to make special provision touching the latter class, that the share or interest granted them would not descend, but would terminate with the life of the donee. Such an inference might arise if no general rule had been made broad enough to include the latter class, but inasmuch as the scope of the general provision for disposing of property on the death of the donee does include the class of aliens not mentioned in this exception or special provision, the only presumption thus raised is that no special provision is intended in regard to that class, and the only logical deduction is that on the death of an alien of that class the disposition of the property is within the general rule. The circumstance that the land of the other class is made to descend in an exceptional manner leads to the same conclusion.

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On the argument, reference was made to the circumstance, that at the time of the passage of the Act there was a class of settlers who were not in sympathy with our Government, and it was claimed that the proviso first above quoted was inserted in the Act for the purpose of discriminating against that class of settlers, and that the Act should be so construed as to give it that effect. It is difficult to perceive that the construction contended for would tend to favor such discrimination. If one of the objects sought to be accomplished by the Act was to discriminate against such British subjects as were unfriendly to our Government, that object would not be advanced by favoring the heirs of those who should thereafter declare the intention to become citizens, and entirely cutting off the heirs of those who had previously done so, especially as it is not to be supposed that many of those not in sympathy with our Government had made such declaration of intention previous to the passage of the Act. The object would have been better effected by dealing liberally with those who had already taken the incipient step, and by denying a donation to those who had not done so, or placing the grant to them under severe restrictions. Want of sympathy with the Government on the part of a portion of the alien settlers does not afford a reason in favor of the construction that would cut off the children or heirs of those who had declared their intentions before the passage of the Act.

The provision of the Donation Act that indicates an intention to discriminate against aliens of any class, is that part of the proviso above quoted which declares that an alien shall not be entitled to a patent until he produces proof of his naturalization, and the right of the plaintiff to the relief prayed for in this case depends upon the question whether the death of Charles P. Matt, while he labored under the disability as to receiving a patent, forfeited the right to the land.

There are several provisions in the Act itself that show that its framers did not conceive that issuing a patent to the donee was indispensable to the operation of the grant; as, for instance, the provision of the fourth section, by which

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the rights of one class of aliens descend to the heirs at law; that of the same section by which the share or interest descends to the survivor and children or heirs, in case the settler has "complied with the provisions of the Act so as to be entitled to a grant," and dies before patent issues; that of the eighth section, by which, on the death of a settler before the expiration of the four years' continued possession, "all the rights of the deceased under this Act shall descend to the heirs at law of such settler, including the widow, where one is left," and the similar provisions found in § 1 of the amendment of 1853. In case of aliens who declared their intentions after the passage of the Act, the property descends to the heirs at law, although the heirs may be aliens, and possibly may not even declare their intention to become citizens. The language of the fourth section assumes that settlers who die before patent issues, may and do become entitled to the grant, and it would seem obvious from the tenor of the Act, if it were not already judicially determined, that the donee takes an estate in the land before the patent issues. The interest thus acquired is something more than a bare possession: the donee has a right which even the Government cannot annul or disregard—it is a property in the land, held by him in his own right, and it is not a mere life estate; the Act contemplates that he may devise it. It is true, his interest at its incipency is an estate encumbered with conditions, but they are conditions subsequent, and it is in his power to render the estate absolute. If he complies on his part, it is not in the power of the Government to divest it; he must, therefore, be deemed the holder of the legal title, as well before as after the patent issues. In the lifetime of Charles P. Matt, and while his naturalization was delayed, his estate did not remain in abeyance for the lack of a patent, and the Act by its terms directed to whom the land should go in case of his death. Withholding the patent from the heir does not necessarily divest the rights of the heir nor the title which the law has cast on the heir. There is nothing in the Act to prevent the patent issuing to the heir if the heir is or becomes a citizen; nor is it indicated in the Act that the

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grant shall become inoperative the moment of the death of the donee, in case a patent has not issued prior to that time. The grant not being limited to an estate for the life of the donee, the grant remained in operation, in the absence of a patent, as well at the moment of the death of the donee as during any other part of the time in which the patent was delayed or retained because the grantee was not entitled to receive it.

We find in §§ 4 and 8 of the original Act, §§ 1 and 8 of the second Act, and § 5 of the third Act, such manifest intention to deal liberally with the heirs and widows of those who are prevented by death from complying with the conditions which Congress deemed it necessary to impose, that nothing short of a clear manifestation of such intention can reasonably be construed to place a particular class of persons in an attitude so opposite to that in which the framers of the law have evidently sought to place those deemed worthy to receive a donation.

The case before us presents this state of facts: A British subject settled upon the land in controversy in 1844, and, with his family, continued to reside upon it until his death, in 1851, prior to which time he made the usual application at the Land Department, he having in 1849 made declaration of his intention to become a citizen. At his death the plaintiff, Theresa Blakesly, who was his only daughter, still claimed the land in right of her father, and it was entered upon by the said Taylor, a stranger to the title, under claim that by the terms of the Donation Law the land which had been thus held by the plaintiff's father for seven years had reverted to the Government.

By the operation of the Donation Act, the plaintiff's father acquired the land in fee, subject to the conditions specified in the Act. (*Summers v. Dickinson*, 9 Cal. 554; *Kernan v. Griffith*, 27 Cal. 87.)

The only restriction contained in the Act bearing any relation to the facts before us, is that expressed in the words, "Provided that no alien shall be entitled to a patent to the land granted by this Act until he shall produce" evidence of his naturalization. It has been universally held that a

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statute which grants land by words of present grant passes the legal title to the grantee by the Act itself. (*Lee v. Summers*, 2 Ogn. 260; *Strother v. Lucas*, 12 Pet. 454; *Fletcher v. Peck*, 6 Cranch, 87.)

This land having been donated to Matt, and the title, on his death, having vested in the plaintiff, Theresa Blakesly, and her mother, whose interest she now has, the United States having no title could not lawfully grant it to another. (*Polk's Lessee v. Wendal*, 9 Cranch, 87; *Patterson v. Winn*, 11 Wheat. 380.)

There are sufficient facts alleged in the complaint to show that the plaintiff is entitled to relief. The title, having vested in the plaintiff's father at the time of the passage of the Donation Act, was not divested by failure to issue a patent to him, nor by his death while he labored under the disability affecting only his power to receive a patent and not his power to take the land, and on his death the land did not revert to the Government. It being private property, the Government could not grant it, and the defendants, as grantees of Taylor, must be deemed to hold the patent in trust for the plaintiff. A decree should be entered in the Circuit Court in accordance with this opinion.

4	288
5	449

4	288
31	369

4	288
40	557

EZRA SCOVILL, APPELLANT, v. HARLOW BARNEY,
RESPONDENT.

PLEADINGS—DENIALS.—A denial that property sued for is of the exact value alleged in the complaint is an admission of any less value.

IDEM—CONJUNCTIVE DENIALS.—Facts stated conjunctively in a complaint should not be denied in the answer as a whole, as conjunctively stated, but should be disjunctively denied in order to raise an issue.

COURT OF EQUITY WILL INTERPOSE—WHEN.—Mere mental weakness, or inadequacy of consideration standing alone, will not warrant the interference of a Court of equity in ordinary cases; but where both these elements are present, equity will take jurisdiction.

APPEAL from Polk County.

The material facts are stated in the opinion of the Court.

Mitchell & Dolph, and Hill, Thayer and Williams, for Appellant.

Ben. Hayden and Boise & Willis, for Respondent.

By the Court, McARTHUR, J.:

This is a suit to set aside or redeem from conveyance the tract of land described in the complaint.

A number of objections were urged to the sufficiency of the answer, into which an examination is deemed necessary.

The complaint alleges that the land in controversy was of the value of twelve thousand dollars on February 15, 1870.

The answer denies "that the said premises were, on the 15th day of February, 1870, worth twelve thousand dollars." This, it is contended, is not a denial of the allegation in the complaint, but is an admission that the lands were, on the day mentioned, worth any sum less than twelve thousand dollars, and raises no issue in relation to the value of the premises. This position is undoubtedly correct, for it is a well-settled rule of pleading under the Code that a denial that the property sued for is of the exact value alleged in the complaint is an admission of any less value. (*Leffingwell v. Griffen*, 31 Cal. 232.)

In *Schaetzel v. The Germantown Mutual Ins. Co.* (22 Wisc. 412), the complaint alleged that on a particular day certain property which was insured in the said company was all destroyed by fire. The answer denied the allegation in the very words of the complaint. It was held that the answer stated no defense, and offered no material issue. "Such a denial," said the Court, "is a negative pregnant with the admission that it may have been all destroyed on some other day, or that a part may have been destroyed on the day named. Such denials have been always held insufficient."

In *Lynd v. Pickel et al.* (7 Minn. 184), it was held that when the question of value is material, a denial that the

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property was of the value alleged in the complaint is insufficient and amounts to an admission of the allegation. The denial should state the property is of no value, or the value as the party claims it to be. Upon this point see also *Baker v. Bailey*, 16 Barb. 54; *Salinger v. Lusk*, 7 How. Pr. 430; *Davison v. Powell*, 16 How. Pr. 467.

Another material allegation of the complaint is that the plaintiff was then, February 15, 1870, mentally infirm and not of sound mind, and so insane as to be wholly incapable of attending to business.

It will be observed that the facts in this allegation are stated conjunctively. The denial is as follows: "Defendant also denies that at the date of the 15th day of February, 1870, the plaintiff was mentally infirm and not of sound mind, and so insane as to be wholly incapable of attending to business." Thus the facts stated conjunctively in the complaint are undertaken to be answered by the defendant denying them as a whole, as conjunctively stated, as will be seen by placing the aggregated statement of facts in the complaint in juxtaposition with the answer made thereto.

This mode of answering is in violation of the common law rules of pleading, and also of the rule established by the Code, which provides that the answer shall contain a specific denial of each allegation of the complaint controverted, or a denial thereof, according to the defendant's information and belief. (*Busenius v. Coffee*, 14 Cal. 91; *Hensley v. Tartar*, 14 Cal. 508; *Blankman v. Vallejo*, 15 Id. 638; *Kuhland v. Sedgwick*, 17 Id. 123; *Canfield v. Sanders*, 17 Id. 569; *Brown v. Scott*, 25 Cal. 195; *Landers v. Bolton*, 26 Cal. 417; *Hopkins v. Everett*, 6 How. Pr. R. 159; *Salinger v. Luck*, 7 Id. 430; *Davidson v. Powell*, 16 Id. 467; *Sherman v. N. Y. C. Mills*, 1 Abb. 187; *Baker v. Bailey*, 16 Barb. 54.)

The defendant, using the language of the complaint, denies that the plaintiff was wholly incapable of attending to business, and also "denies that on a certain day he fraudulently took advantage of the plaintiff's incapacity, and, under pretense of making a loan to plaintiff, fraudu-

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lently procured him (plaintiff) to sign and execute a certain writing of that date under seal, which purports to be a deed of such premises." And again he stops with the denial "that said note and the proceeds thereof was the only consideration thereof which the plaintiff received for said deed," without alleging what further or other consideration was received by the plaintiff, which he should have alleged if he relies upon any further consideration.

Under the rule just referred to, every one of these denials is insufficient, and the case is with the plaintiff on the pleadings. But inasmuch as counsel have submitted the entire case, together with all the depositions, to this Court, we have concluded to pass by the questions relating to the technical sufficiency of the pleadings and to decide this suit upon the merits.

We are of opinion that the preponderance of testimony clearly shows that at the time the deed in question was executed, the plaintiff was of such weak understanding as to be incompetent to transact business, and that the consideration paid for the land in controversy was grossly inadequate. These conclusions of fact being reached, the question of law to be determined is, can equity afford relief?

In 3 Leading Cases in Equity, 136, it is said that "a Chancellor will not interfere under ordinary circumstances, on the ground of mental weakness, or of inadequacy of consideration, so long as either stands alone, and there is no reason for supposing that one has led to or resulted in the other. When, however, both these elements are present the case changes its aspect, and there will be ground for an inference that the inadequacy is due to the exercise of undue influence, or that undue advantage has been taken of the weakness, and equity will set the whole transaction aside unless this presumption is rebutted satisfactorily. Hence, while proof that the powers of one of the parties to a contract were decayed or enfeebled may be nothing in itself, it will be everything when the bargain is one that no man, in the full possession of his faculties, would have made, and that no man should have made with another who

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had lost the power of taking care of himself." The authorities upon this point are overwhelming. The presumption alluded to has not, in our opinion, been satisfactorily rebutted, hence the doctrine applies to and must govern in this case.

The defendant's counsel insist that the conveyance was executed by the plaintiff to enable him to defraud his creditors, and that the rules of equity cannot be invoked to assist him in recovering the property. We have found that the plaintiff was at the time of weak understanding, and that he was overreached in the transaction by the defendant. His mental condition was such as would release him from moral responsibility, and equity will relieve him from the effect of the contract. It is settled, we think, beyond controversy, that where a party is of weak understanding, and is overreached in a transaction, Courts of equity will not enforce a rule for the prevention of fraud when, in so doing, a greater fraud would be sanctioned. (*Collins v. Blanton*, 1 Smith's L. C., pt. 1, p. 637; *Ford v. Harrington*, 16 N. Y. 285.)

In both these cases the numerous authorities bearing upon this question are cited and referred to.

We do not deem it necessary to pass upon the question of the intention of the plaintiff in executing the deed, for whether mortgage or deed absolute, the same causes which move us to relieve against the one would operate to relieve against the other.

It follows that the decree in the Court below must be reversed, and a decree in accordance with this opinion be entered here.

Decree reversed.

JEHIEL S. KENDALL, RESPONDENT, v. W. H. McFARLAND, APPELLANT.

MECHANIC'S LIEN.—When judgment is rendered to enforce a mechanic's lien, an execution may be issued thereon to sell the premises.

DEM.—Under the statute mechanics' liens have precedence over all other liens after the commencement of the building; but the statute must be strictly complied with in order to secure such precedence.

Opinion of the Court—Prim, J.

IDEM.—In an action to enforce such liens it should appear when the building was commenced, to enable the Court to determine when the liens attached.

IDEM.—If it nowhere appears in the judgment-roll when the liens attached to the building, the judgment would operate as a lien upon the premises as an ordinary judgment from the time it was docketed.

APPEAL from Benton County.

Strahan & Burnett, for Respondent.

Chenoweth, Hill, Thayer and Williams, for Appellant.

By the Court, PRIM, J.:

This was a suit in equity, commenced in the Circuit Court of Benton County, by respondent J. S. Kendall, to foreclose a mortgage on certain premises, situate in the town of Corvallis, with a building thereon known as "Hunt's Brewery." This mortgage was executed on June 30, 1870, by Joseph Hunt and Anna Hunt, his wife, to secure the payment of one thousand dollars. W. H. McFarland, John Hunt, Bernard Hunt and Henry Solle were also made defendants to this suit. The appellant, W. H. McFarland, not being united in interest with his co-defendants, filed a separate answer, claiming to be the absolute owner of the premises embraced in the mortgage.

The title claimed by appellant was obtained as follows, to wit: He and six others claimed to be the holders of mechanics' liens against the said premises, in different amounts, for labor and materials furnished for the construction of the building thereon known as "Hunt's Brewery." Prior to the commencement of this suit these lien-holders had commenced separate actions at law against said Hunt to recover the respective amounts due them, and to enforce their respective liens against said premises. Each of them succeeded in obtaining a judgment against Hunt for the amount due him, and also a judgment that the premises be sold and the proceeds thereof applied to the discharge of his said lien. The aggregate amount of these judgments was \$2245.65 exclusive of cost and disbursements. Three of these judgments were docketed on the 9th day of Decem-

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ber, 1870, two of them on the 28th of November, 1870, and two on the 7th day of December, 1870. The mortgage was executed and recorded prior to the time when these judgments were docketed, and it nowhere appears in the records of these judgments when the building was commenced or when the mechanics' liens attached.

Executions were issued on each of these judgments against Joseph Hunt for the amount specified therein, and were levied upon the premises described in the mortgage. The notice required by law having been given, the premises were sold by the Sheriff, under and by virtue of said executions, to appellant for \$2550. The sale was duly confirmed by the Court, and after the term for redemption had expired the Sheriff executed a deed to McFarland, who immediately took possession of said premises. These executions were not issued specially against the property upon which these parties claimed to hold mechanics' liens, but against Joseph Hunt, commanding the Sheriff "that out of the personal property of said defendant, or if sufficient cannot be found, then out of the real property belonging to said defendant, in your county, on or after the 7th day of December, 1870, you satisfy the sum of ——— dollars." Upon the hearing of this cause the Circuit Court found the equities to be with respondent, and entered a decree in accordance with such finding, from which McFarland has appealed to this Court.

The question presented here is, what interest or rights did appellant acquire in the property in question, sold by the Sheriff under the executions issued upon these several judgments? If the parties desired to enforce their respective liens against the property upon which they were claimed they should have issued special executions to sell that property.

The statute, in providing how such liens may be enforced, provides that "if judgment be rendered for the plaintiff he may have an execution issued thereon to sell the premises." (Mis. Laws, ch. 32, § 6.)

The executions issued were not special, but general executions authorizing the Sheriff to sell such real property as belonged to Hunt on the day the judgments were docketed,

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or at any time thereafter, upon the condition that sufficient personal property could not be found by said Sheriff out of which to satisfy said execution. But the mortgage of respondent having been executed and duly recorded, prior to the time when these judgments were docketed, Hunt, it appears, had parted with all his interest in this property, prior to that time, unless it might be the right of redemption. But it is claimed that the liens for which these judgments were given were mechanics' liens, and that it is provided by statute that such "liens shall have precedence over all other liens after the commencement of the building." (Mis. Laws, ch. 32, § 7.)

The statute undoubtedly has given priority and precedence to this class of liens over all other liens, but a party who wishes to secure such priority and precedence is required to proceed strictly in accordance with the provisions of the statute. It was held by this Court at a former term, that the remedy created by this statute is an extraordinary one, "created in derogation of common law and ought to be strictly construed." (*Dalles Lumber and Manufacturing Company v. The Wasco Woolen Manufacturing Company*, 3 Ogn. 527.)

No time having been specified in any of these judgments when the building was commenced, upon which the liens were claimed, the judgments could only operate as liens upon such property, the same as an ordinary judgment, from the time when they were placed upon the judgment-lien docket; and in consequence of these judgments failing to show when the mechanics' liens attached to the building, we are unable to see how any other or greater interest could have been sold under special execution than was owned by Hunt in the property on the day when the judgments were docketed.

In an action to enforce a mechanic's lien, if the party desires his lien to be enforced from the commencement of the building upon which the lien is claimed, the time when the building was commenced should be averred in the complaint, so that it may be determined and adjudged by the Court at what time said lien attached to the building.

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To enable appellant to hold the premises against the mortgage of respondent, it should have appeared in the judgments and proceedings under which he claims title, that these mechanics' liens attached to the building in question prior to the time when respondent's mortgage was executed and recorded. The time when these liens commenced to have an existence was one of the main questions to be ascertained and judicially determined in said action. If no time was mentioned in said proceedings when said liens attached, we are unable to see how it can be done here after said judgments have been executed.

Again, if this mortgage was executed prior to the commencement of these actions to enforce these mechanics' liens, respondent was entitled to have the summons served upon him, so that he might become a party defendant to said actions, if he desired to do so. This, however, not having been done, these judgments could not conclude any rights defendant may have had in said premises.

It is ordered that the decree of the Court below be affirmed.

**ADOLPH AND MARGUERITE JETTE, APPELLANTS, v.
HONORE AND CELESTE PICARD, RESPONDENTS.**

DONATION LAW—RIGHTS OF MARRIED WOMEN UNDER.—L. took up two hundred and sixty-three and fifty-three one-hundredths acres of land under § 4 of the Donation Law, and, being married at the time, held that his wife was entitled to have one-half thereof set apart to her. The right of the wife in no way depends upon the number of acres in the claim.

WILLS—CONSTRUCTION OF.—The intention of the testator must be looked to in construing a will. Wills operate upon what is found to actually belong to the estate of the testator.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Williams & Willis and R. P. Boise, for Appellants.

G. W. Lawson and Eugene Sullivan, for Respondents.

By the Court, MCARTHUR, J.:

Tanisse Liard settled upon, claimed and commenced to cultivate land claim No. 95 in township 4 south, range 2 west, containing two hundred and sixty-three and fifty-three one-hundredths acres lying in and being parts of sections 20, 21, 22, 27, 28 and 29, in said township and range, in 1846, and continued to reside upon and cultivate and possess said lands until his death. He filed his notification to hold said lands under the Donation Law (so called) in his own individual right, without stating that he had a wife, and duly made his final proof of four years' residence and cultivation, as by the law required to entitle him to a patent from the United States. On December 29, 1851, after having made such final proof, he executed a will, and dying shortly afterward, said will was admitted to probate, September 2, 1852. Shortly afterward a certificate was issued by the proper officers to his heirs at law for all of said lands. The date of his marriage with Celeste (now intermarried with Honore Picard) was February 5, 1849, and he continued to live with her upon said premises from the date of their marriage until the time of his death, about March 15, 1852. Marguerite is the only child of Tanisse Liard and is the fruit of his marriage with Celeste. By the terms of the will he bequeathed and devised to his wife, Celeste, and to his daughter, Marguerite (now intermarried with Adolph Jette), each "one-half of all the personal property and real estate of which he should die possessed or seized."

In March, 1870, a petition was presented to the officers of the proper land office on behalf of Celeste, which was contested by Marguerite. After hearing the matters set out in the petition, the donation certificate, which had been previously issued to the heirs at law of Tanisse Liard, was, on September 20, 1870, corrected and changed so as to give the heirs at law the north half of the claim, and to Celeste, the widow of Tanisse, the south half thereof. This decision remains unappealed from and is in full force. Some time prior to the decision of the land officers, this suit was instituted for partition of the premises, and was continued

Statement of Facts.

from term to term, and finally at the June term, 1871, was heard. After hearing, the Court made a decree dismissing from consideration the south half of the claim, and ordering that the north half thereof be equally divided between Celeste and Marguerite. From this decree Marguerite appeals, and urges that she is entitled under the will to one-half of the entire tract.

When Liard availed himself of the provisions of the Donation Law he was at liberty to take up six hundred and forty acres, one-half of which would go to his wife. He could take any less number of acres, but could not so take as to preclude his wife from her share of what was taken. The right of the wife in no way depends upon the number of acres taken up. She has a clear right to half of whatever quantity of land he took. (Donation Act, § 4.) When he executed the will it seems he was laboring under the impression that his wife had no interest in the claim,—that is, nothing in her own right. There is nothing in the case which warrants any other conclusion than that he was simply mistaken; there is nothing at all which savors of fraud. The provisions of the will operate only upon the north half of the claim, for that is all that he owned at the time of its execution.

It is a settled principle that the intention will govern in the construction of a will, but it is equally true that a man cannot devise by testament what he does not own. Courts cannot apply a will to any property but that which is found to actually belong to the estate of the testator.

Decree affirmed.

EMILY C. PITTMAN, APPELLANT, v. WM. M. PITTMAN, RESPONDENT.

WIFE'S RIGHT OF ACTION AT LAW.—A divorced wife cannot maintain an action at law against her divorced husband upon an implied contract arising during coverture.

APPEAL from Linn County.

The complaint alleges that on or about December 3, 1864, the defendant received from the plaintiff's father the sum of

Opinion of the Court—McArthur, J.

one thousand dollars in gold coin to the use of the plaintiff; that demand for the payment thereof was made, but that the defendant has not paid any part thereof, but is now justly indebted to the plaintiff in the sum of one thousand dollars. The answer denies specifically each affirmative allegation of the complaint, and alleges that on July 4, 1858, the plaintiff and defendant were lawfully married, and continued to be husband and wife until July 14, 1870, at which date they were divorced by decree of the Circuit Court for Benton County. And further, that the plaintiff, as heir at law of Hetty Allen, deceased, was entitled to a certain one-fifth of said decedent's land claim. That the same was sold to one Chambers, the proceeds thereof being eight hundred dollars, and that Chambers, with the knowledge and assent of the plaintiff, paid the same to one Mulky's administrator, in discharge of a demand of said administrator against the defendant, and that there never was any previous agreement or understanding that the money should be refunded to the plaintiff. The Statute of Limitations is also pleaded. The new matter in the answer is denied in the reply, and therein it is further alleged that there was an understanding that plaintiff was to have the money to her own use; that she always claimed it; that the money was the proceeds of her interest in her mother's estate, and that at the time of instituting this action the plaintiff was a single woman.

Defendant moved for judgment on the pleadings; and from the order allowing said motion and dismissing the action the plaintiff appeals.

By the Court, MCARTHUR, J.:

A careful examination of the pleadings discloses that this is an action at law upon an implied contract for the payment of money, and that at the time of the transaction out of which the implication arises, the parties were husband and wife. At common law, husband and wife were incapable of making any contract, express or implied, which a Court of law would countenance or uphold. Nor does the constitutional provision (Art. XV, § 5) break the force of this rule. That provision was adopted for the protection of the wife's prop-

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erty from the debts or contracts of the husband. It does not enlarge her strictly legal rights so far as to allow her to sever her unity from her husband, and enable her to enter into contracts with him as with a mere stranger. The appellant cannot recover upon the implied contract pleaded in a Court of law. The only forum wherein the questions presented by this record can be properly examined into, and the adequate remedy afforded, is a Court of equity.

Courts of equity protect with great care the separate property of the wife and the proceeds thereof, and enforce against all persons any reasonable agreement concerning it. The beneficent rules which they now apply in this class of cases have tempered the harshness of those relics of feudalism which still find sanction in courts of law.

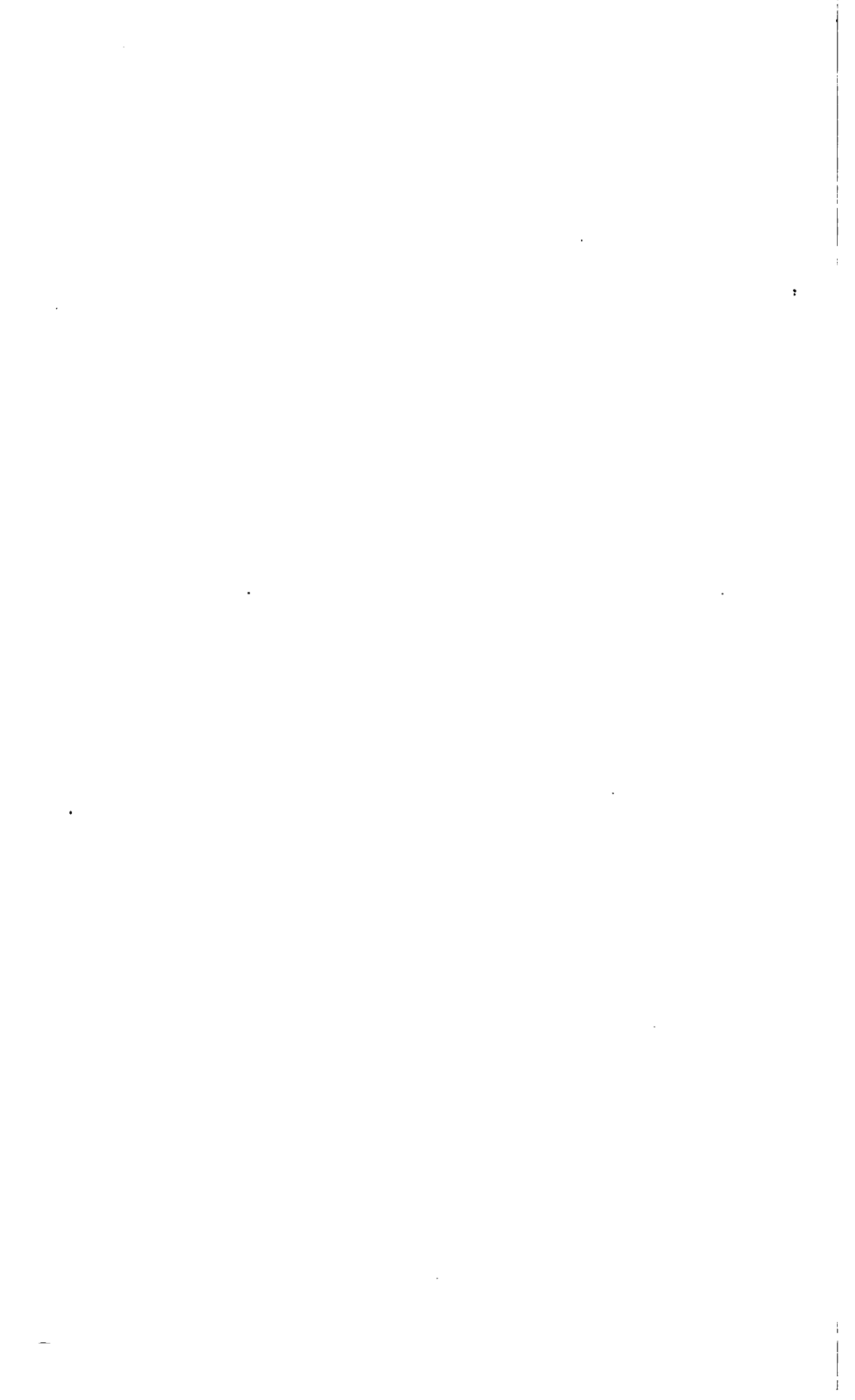
In this case the amount sought to be recovered was the proceeds of the sale of a parcel of land inherited by the appellant during coverture. Under no circumstances could the land, or the proceeds thereof, have been reached by any process issued at the instance of the creditors of the respondent. Being a pecuniary right, occurring during coverture, the respondent could not equitably appropriate it to his own use, or to the discharge of his liabilities, without the knowledge and assent of the appellant. If appropriated for such purpose by the husband without the wife's knowledge and assent, every consideration of morality and justice would lead a court of conscience to assert its jurisdiction, and order the husband to make restitution. If so applied with her knowledge and assent, we see nothing in the way of treating it as an equitable loan, unless the wife absolutely renounced all claim thereto.

In New York, where the property rights of married women are not more fully protected by legislative enactment than they are in Oregon by constitutional provision, it is well settled that a wife can loan money to her husband, and, before repayment by him, she has a claim against him which she can enforce in equity, though not at law. (*Savage v. O'Neil*, 44 N. Y. 302.) Transactions of this character are not *nudum pactum*. Where the money arises from the wife's separate property, over which she has com-

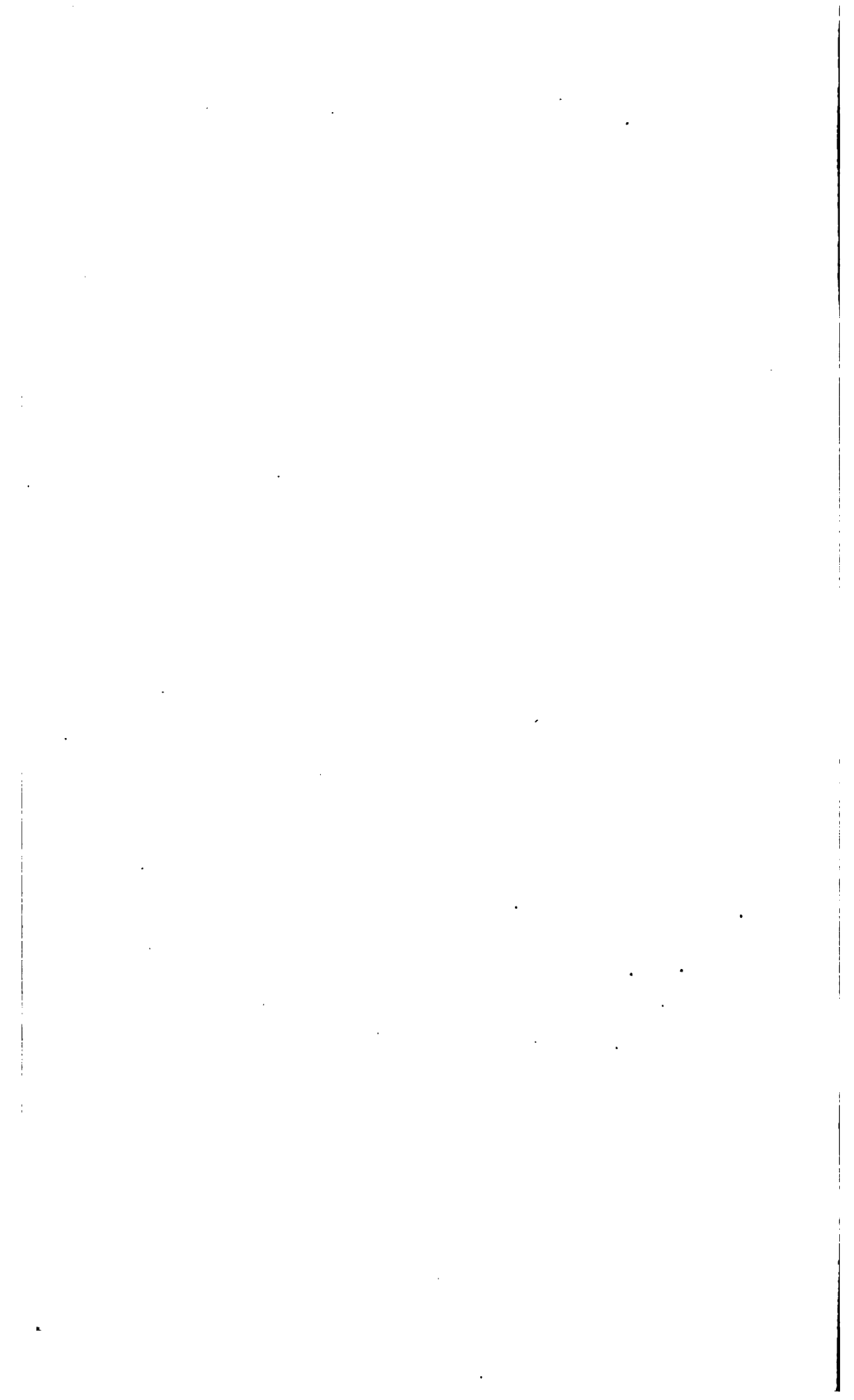
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plete control, when the husband borrows it, there is in equity a valid consideration to repay it. (*Woodworth v. Sweet*, 51 N. Y. 10.)

• Judgment affirmed.



JANUARY TERM, 1873.



REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JANUARY TERM, 1873.

**CALEB S. TUSTIN, APPELLANT, v. SAMUEL D. GAUNT,
RESPONDENT.**

COUNTY COURTS—JURISDICTION OF.—The Constitution of this State provides that County Courts shall be Courts of record having general jurisdiction, to be defined and limited by law; and the Legislature having given them exclusive and original jurisdiction in all matters pertaining to Probate Courts: *Held*, that County Courts, in exercising judicial powers in such business, should be regarded as Courts of general and superior jurisdiction.

IDEM—PRESUMPTIONS.—Whenever their proceedings and judgments come in question collaterally, they are entitled to all the legal presumptions pertaining to the records of Courts of superior jurisdiction.

PROCEEDINGS IN COUNTY COURT, HOW IMPEACHED.—The proceedings and judgments of County Courts in probate matters import absolute verity, and whenever they come in question collaterally cannot be impeached by evidence *al'tunde* the record; but may be impeached by evidence appearing upon the face of the record showing a want of jurisdiction in the Court.

RECORD.—Under the Code the record includes all the papers and proceedings contained in the judgment-roll.

WHEN WANT OF JURISDICTION WILL APPEAR.—When the record recites what was done, and the facts so recited are not sufficient to give the Court jurisdiction, a want of jurisdiction will appear upon the face upon the record.

WHEN THE RECORD IS SILENT.—Legal presumptions do not come to the aid

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20*	326
28*	387

4	305
135	175

4	305
41	527

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of the record, except as to facts touching which the record is silent. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done. If appellant was a minor, and had no guardian when the order of sale was made, it was the duty of the Court to appoint one before making such order; but the record being silent, the law presumes the Court did its duty. No evidence *aliunde* the record will be admitted to impeach the proceedings and orders of a Court of general and superior jurisdiction.

APPEAL from Yamhill County.

W. M. Ramsey, for Appellant.

R. P. Boise and P. C. Sullivan, for Respondent.

By the Court, PRIM, J.:

This was an action of ejectment in the Circuit Court of Yamhill County to recover the one-eighth of one hundred and ninety acres of land situate in the county of Yamhill, State of Oregon. Caleb S. Tustin, the appellant, claims title as one of the heirs of his father, Charles S. Tustin, who died intestate in said county in the fall of 1862, seized of the land in question, leaving a widow and seven other children besides appellant.

Respondent claims title to the land under a sale made by the administrator of the estate by said Tustin, deceased, in pursuance of certain probate proceedings and orders had and made in the County Court of Yamhill County. The title of respondent depends upon the validity of those proceedings and orders of the County Court and the sale made in pursuance thereof, as it appears that appellant was entitled to the interest in question as one of the heirs of his father, unless he has been divested of the title by this sale.

Respondent, to prove title in himself, offered in evidence the record containing the order of the County Court of Yamhill County, appointing David Smith administrator of the estate of the said Tustin, deceased; and also the proceedings and orders of said Court pertaining to the sale of the land belonging to said estate, including the land in question. Appellant objected to the admission of these

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proceedings, orders and sale made in pursuance thereof, as incompetent evidence to prove title in respondent, upon the ground that the Court had no jurisdiction of either the subject-matter or of the parties interested in said estate at the time they were made, as he claims, and that, therefore, they are absolute nullities. He contends that the County Courts of this State, in exercising judicial powers in probate matters, should be regarded as Courts of inferior and limited jurisdiction, and that none of these orders and proceedings should have been admitted in evidence without first proving all the necessary facts authorizing such Courts in making such orders. Respondent, however, contends that they are Courts of record under the Constitution, with *original* and *exclusive* jurisdiction in all *probate matters*, and in exercising judicial powers in those matters should be regarded as Courts of superior jurisdiction, and that all their proceedings, orders and judgments are entitled to all the presumptions of law pertaining to such Courts.

This presents the main question to be decided in this case, that is, whether these Courts, in exercising judicial powers in probate proceedings, should be treated as Courts of inferior or as Courts of superior jurisdiction.

This is the first time in the judicial history of this State that this Court has been called upon to decide this question. We are aware that it has already been held by this Court in several cases heretofore decided and reported that "the County Court or Board of County Commissioners, so far as it exercises judicial powers, is a Court of special and limited jurisdiction," and, as a logical sequence, that the facts necessary to confer jurisdiction should appear upon the face of its record or its proceedings, whenever brought in question collaterally, are mere nullities. (*Thompson v. Multnomah County*, 2 Ogn. 37; *State of Oregon v. Officer*, ante, p. 180; *Johns v. Marion County*, ante, p. 46.)

It appears, however, that these were all cases in which the County Court was engaged as a Board of County Commissioners, in the laying out of county roads, which was purely county business as contradistinguished from probate

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business; consequently we are led to the conclusion that the Court, in the use of the language above referred to, only intended to be understood as holding that these Courts were Courts of inferior and limited jurisdiction, when exercising judicial powers in the particular class of cases then under consideration.

Section 1 of Article VII of the Constitution provides, "That the judicial power of the State shall be vested in a Supreme Court, Circuit Courts and County Courts, which shall be Courts of record, having general jurisdiction, to be defined, limited and regulated by law in accordance with this Constitution.

"Justices of the Peace may also be invested with limited judicial powers."

Section 12 provides that "the County Court shall have the jurisdiction pertaining to Probate Courts and Boards of County Commissioners," etc.

Section 869 of the statute provides that "the County Court has the exclusive jurisdiction in the first instance pertaining to a Court of Probate," among which is enumerated the power "to grant and revoke letters of administration," and "to order the sale and disposal of real and personal property of deceased persons."

It will be seen that the same language is used in the Constitution in reference to the Supreme and Circuit Courts that is used in regard to County Courts, as to their being "Courts of record having general jurisdiction, to be defined, limited and regulated by law."

As the Constitution of the State provides that County Courts shall be Courts of *record* having *general jurisdiction*, to be defined and limited by law, and the law having fixed the limitation by giving them *exclusive* and *original* jurisdiction in *all matters* pertaining to *Probate Courts*, we conclude that, in the transaction of such business, they should be regarded as Courts of superior jurisdiction, as contradistinguished from Courts of inferior and limited jurisdiction. Having arrived at this conclusion, we are to accord to their judgments and proceedings in such matters, whenever they happen to come in question collaterally, all the

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presumptions of law pertaining to the judgments and proceedings of that description of Courts.

"The true line of distinction between Courts whose decisions are conclusive, if not removed to an Appellate Court, and those whose proceedings are nullities, if their jurisdiction does not appear on their face, is this:

"A Court which is competent, by its constitution, to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment, or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A Court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities." (2 How. U. S. 341.)

"A judicial record" is defined to be "the record, official entry or files of the proceedings in a Court of justice." (Civ. Code, § 719.)

These proceedings and orders of the County Court, in the matter of the estate of Tustin, deceased, are "judicial records," as they come clearly within this definition of the Code; and whenever such a record is produced in evidence, during the progress of the trial, to establish some right in the party producing it, and is thus brought in question collaterally, it may be attacked or impeached by the opposite party, and the presumption arising therefrom overcome by evidence of a want of jurisdiction in the Court in which such record was made, for the record of any Court is absolutely void whenever it appears from such record that there was a want of jurisdiction in the Court, either over the subject-matter or parties in interest, to make such record. (Civ. Code, § 732; *Hahn v. Kelly*, 34 Cal. 407.)

When, however, the record of a Court of general jurisdiction comes in question, a *want* of jurisdiction cannot be

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shown by evidence *aliunde* the record, and “no facts or circumstances which do not appear upon the face of what constitutes the record,” designated in our Code as the judgment-roll, can be used for such purpose, for the reason that “the record of a Court of superior jurisdiction imports absolute verity, and cannot, therefore, be collaterally impeached from without.” (*Hahn v. Kelly*, 34 Cal. 402.)

It may be asked, in this connection, what is meant by a want of jurisdiction appearing upon the face of the record. We answer that a want of jurisdiction appears upon the face of the record “whenever what was done is stated in the record, and which, having been done, is not sufficient in law to give the Court jurisdiction.”

In *Hahn v. Kelly*, the Court said: “We consider the true rule to be that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is *silent*. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done.” “That the law conclusively presumes the jurisdictional facts in the case of a judgment of a Court of general jurisdiction, so long as the record shows nothing to the contrary, but does not make any such presumption in favor of the judgments of Courts of limited jurisdiction. The jurisdiction of such Courts, not being presumed, must depend upon actual facts, which, of course, are open to dispute, and not concluded by the record, for if the jurisdictional facts did not exist, the Court really had no jurisdiction, and its record is not, in the eyes of the law, an absolute verity, but a mere unauthorized narrative.” (20 Conn. 199.)

Having arrived at the conclusion that the proceedings and judgments of our County Courts in the transaction of probate business are entitled to all the legal presumptions pertaining to the proceedings and judgments of Courts of general jurisdiction, it will be necessary to apply these legal presumptions to the proceedings and orders of the County Court produced in evidence in this case, in order to determine whether such orders are valid, or whether they were mere nullities on account of a want of jurisdiction in the Court at the time they were made.

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The first order produced in evidence by respondent was the order granting letters of administration upon the estate of said Charles S. Tustin, deceased. To obtain this order under the statute in force at the time it was granted, it was necessary to file a petition showing two jurisdictional facts: first, the death of Tustin; and second, that he was an inhabitant of the county at the time of his death, both of which facts sufficiently appear from the language used in the petition filed to obtain the order, which is as follows, to wit: "The undersigned would respectfully petition the Hon. County Court of Yamhill County, Oregon, to be appointed administrator of the estate of C. S. Tustin, late of said county and State, now deceased."

We will next examine the proceedings and orders of the County Court pertaining to the sale of the realty of said Tustin, deceased, in order to ascertain whether a want of jurisdiction in the Court, either over the subject-matter or persons in interest, appears upon the face of the record. For it will be conclusively presumed that all the necessary jurisdictional facts did exist, and were made to appear to the Court, unless a want of jurisdiction appears upon the face of the record, or some portion of it.

This proceeding was had under the old statute of 1855, which provides that "when the personal estate in the hands of the administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, he may sell the real estate for that purpose upon the order of the County Court. To obtain such order he shall present a petition to such Court, and if it shall appear by such petition that there is not sufficient personal estate in his hands to pay the allowance to the family, the debts of deceased and expenses of administration, and that it is necessary to sell the whole, or some portion of the real estate, the County Court shall make an order directing all persons interested in the estate to appear, at a time and place specified in the order, to show cause why such order should not be made. A copy of such order is required to be served personally on all persons interested in the estate, or be published at least four successive weeks in such news-

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paper as the Court shall order. If the Court shall be satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that such sale is necessary for the payment of the debts, allowance to the family and expenses of administration, such order shall be granted." (Stat. of 1855, p. 360.)

It appears upon the face of this record that "the administrator, upon affidavit filed according to law, presented a petition to the Court for a license to sell the real estate of said estate," and, "it appearing to the satisfaction of the Court that there is not sufficient personal property to pay the debts of said estate, the necessary allowance to the family, and the cost of administration," etc., an order is then made directing all persons interested in said estate to appear at the time and place specified therein to show cause why such order should not be granted; also, directing this order to be published in the *Oregon Argus* for four successive weeks. The order of sale contains the further recital that this "petition came on for final hearing, and, it appearing to the Court that due notice of this hearing had been given to those interested in said estate; * * * and it further appearing necessary for the payment of the debts of the deceased that said real estate should be sold, it was therefore ordered," etc.

Thus it is seen that it not only appears upon the face of the record that the Court had jurisdiction of the subject-matter, but of the parties in interest. But it is, however, further claimed for the appellant that he was a minor at the time these proceedings were had, and that he had no general guardian, and that none was appointed for him by the Court to appear and take care of his interest in these proceedings, and therefore they are void as to him. It is true the statute requires that if any of the heirs of the deceased are minors and have no general guardian, the Court, before proceeding to act upon such petition, shall appoint some disinterested person to appear and look after the interest of such minor in such proceeding. But to this proposition we reply that the record being silent as to whether any guardian was appointed for appellant or not, "the law

Points decided.

presumes that what ought to have been done was not only done, but rightly done." (*Hahn v. Kelly*, 34 Cal. 407.)

It was further proposed, however, by counsel for appellant, to impeach these proceedings of the County Court in relation to the sale of the land in question, by offering to prove by appellant that he was a minor under eighteen years of age at the time said proceedings were had in said Court; also that he had no guardian in the county, and none was appointed for him by the Court to take care of his interest in said matter, and that no notice of said proceedings was served upon him. This proposition was very properly overruled by the Court, as no evidence *aliunde* the record could be admitted to impeach the proceedings and orders of a Court of general and superior jurisdiction.

No substantial error having been committed in the trial of this cause by the Circuit Court, it is ordered that the judgment be affirmed.

E. BOHLMAN, RESPONDENT, v. S. COFFIN AND C. M. CARTER, APPELLANTS.

REFEREE.—A referee is an officer of the Court. He is clothed with important powers, and some weight must be given to his certificate, and some discretion allowed him in the manner of taking testimony and returning exhibits.

IDEM—CERTIFIED COPIES OF EXHIBITS BY.—When an original instrument is offered in evidence before a referee, and he makes a certified copy thereof, and files and returns the certified copy as an exhibit, such exhibit will not be disregarded except in peculiar cases.

CONSTRUCTION OF DEED.—To properly construe a deed it must be taken by "its four corners," and the intention of the parties, when discovered, must be carried out.

NOTICE.—Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, operates as notice.

IDEM.—Actual and unequivocal possession is notice.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

J. G. Chapman, for Respondent.

O. P. Mason and Whalley & Fechheimer, for Appellants.

4	818
4	850
5	317
12	9
12	10
12	17
6*	177
6*	182

4	313
24	113
32*	1046

4	319
30	173

4	313
134	490

4	313
39	214

4	818
48	856
48	396

4	313
148	574

Opinion of the Court—McArthur, J.

By the Court, McARTHUR, J.:

This is a suit to set aside a deed from Stephen Coffin to Charles M. Carter, of date August 20, 1870, and to compel the defendants to execute to the plaintiff a deed to lots two (2), three (3), and four (4), in block one hundred and fifty-six (156), in the city of Portland, in accordance with Coffin's covenant of further assurance, contained in the deed of date June 25, 1850, from Coffin, Lownsdale and Chapman, to Lownsdale, under which the respondent derails title. It appears that, on said last date, Coffin, Lownsdale and Chapman, as proprietors of the then town of Portland, by deed of conveyance, for a valuable consideration, bargained, sold and conveyed to Lownsdale, the lots aforesaid, and that the said deed contained the covenant of the said parties, grantors therein, that if they, or either of them, should obtain a patent from the United States for said premises, he, or they, would convey the same to said grantee or his assigns, by deed of general warranty.

Lownsdale continued in possession of said lots until June 15, 1851, when he conveyed one of them, numbered two (2), and delivered the possession thereof to one John M. Breck. This lot Breck transferred to Hart by deed dated February 5, 1859. Hart transferred the same to Robinson by deed dated July 5, 1859. Robinson transferred the same to Gault by deed dated December 15, 1859. Gault transferred the same to Burchard & Powers by deed dated July 12, 1869, and Burchard & Powers transferred the same to Bohlman, the respondent, by deed dated October 11, 1870. Lownsdale continued in possession of lots numbered three (3) and four (4), in said block, from the date of the deed from Coffin, Lownsdale and Chapman to him (L.) until February 25, 1858, when he transferred them to Breck. Breck transferred them to Delschneider by deed dated September 2, 1859. Delschneider died February 25, 1862, and his heirs, Frederick, Hannah and Rosa, continued in possession. On June 5, 1862, Rosa intermarried with D. E. Buchanan, and shortly afterward, by a suit in partition, it was decreed by the proper tribunal that Rosa take said lots

three (3) and four (4), in block one hundred and fifty-six (156), as her share of the estate of her deceased father. The same being thus decreed in Rosa Buchanan, she, together with her husband, sold and transferred the said lots to Hart by deed dated June 30, 1866, and Hart transferred the said lots to Bohlman, the respondent, by deed dated August —, 1866.

In 1862 Coffin acquired title from the United States, and the patent embraces the lots in controversy. He, by deed of August 20, 1870, conveyed to Carter all his right, title and interest in said lots and divers other lots and parcels of land in Multnomah County. The testimony clearly supports the conclusion that Lownsdale and those claiming under him, down to and including the respondent, have been in the open and notorious possession of the property described.

The first question of importance is as to whether Coffin was bound by the covenant in the deed to Lownsdale of June 25, 1850. That was a good and valid deed as between Chapman and Coffin as grantors, and Lownsdale as grantee, and we are of opinion that Coffin is bound by the covenant of further assurance therein contained, and that it was his duty to have executed to the assigns of Lownsdale under the deed, a deed of general warranty, after he obtained his patent from the general government. Before proceeding to discuss the other more important feature of the case, it is deemed necessary to pass upon two propositions contended for by appellants' counsel in relation to the sufficiency of the testimony.

It seems that when the referee was taking the testimony herein, W. W. Chapman was sworn as a witness. He was shown the original deed of Chapman, Coffin and Lownsdale to Lownsdale, and testified positively that he saw Coffin sign and execute the same. Thus much the interrogatories and answers prove beyond all contention. The referee had a copy of the deed made and filed as an "exhibit," and that together with all the other exhibits was returned to the Circuit Court under the certificate of the referee. The referee is an officer appointed by the Court,

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and by his appointment is clothed with very important powers, and some weight must be given to his certificate, and some discretion must be allowed him in the manner of taking and returning testimony and exhibits. He acts under oath and is presumed to be qualified to discharge his office conscientiously, and it cannot be presumed that the copy he has returned is not a true copy. Indeed, counsel practically admitted it to be a true copy, but urged as this is a trial *de novo* the original ought to be here. It is true that it would be better in all cases coming here to be tried *de novo* for the original papers offered as exhibits to be sent up with the deposition, and in some cases it would be absolutely necessary; as where a question arises as to an erasure or an interlineation, in which case an inspection of the original might be necessary to properly pass upon the rights of the parties. But nothing of this kind is urged here, and this fact, taken in connection with the deposition of Chapman and the certificate of the referee, as well as the practical admission of its correctness by counsel in the argument, leads us to the conclusion that it would be improper to reject it.

There is also in this deed a defect, which the appellants' counsel claims overcomes the force of the covenant of further assurance. The language used is, "If the party of the second part obtains title from the United States they will convey the same to the party of the second part by deed," etc. We are called upon, therefore, to construe this part of the deed. This is not a difficult matter, for it is manifest from the context, from the subject-matter, and from the relation of the parties, that the use of the word *second* was a mere clerical error, and that the parties intended to use the word *first*. Under the technical canons of construction of the old common law this would not have defeated the deed or the covenant, still less would it do so when we apply the modern doctrine, which allows us to construe the whole deed together in order to discover the intention of the parties, and when discovered to carry out such intention. (*Ewing v. Burnet*, 11 Peters, 54.)

Taking the deed "by its four corners" the intention of

the parties is manifest. To hold that the covenant in this deed is not binding because the parties unintentionally used the words "second part" when it is apparent from the context that they intended to use the words "first part," would be as shocking to equity as anything we can well imagine. Common sense and common honesty forbid that we should do so. This covenant must stand.

The testimony conclusively shows that the respondent and those under whom he derails title were in the open and notorious possession of lots numbered three (3) and four (4) from the date of the original deed to Lownsdale down to the date of the deed from Coffin to Carter, and it also appears that the respondent's immediate grantors, Burchard & Powers, and those under whom they derailed title, were in the open and notorious possession of lot numbered two (2) from the date of the original deed to Lownsdale down to the date of the deed from Coffin to Carter—Burchard & Powers conveying to the respondent after the date of said deed. All their equities passed with the land to Bohlman, and, as they affect his estate, he can assert them against Carter. Was this open and notorious possession notice to Carter, and if so, was his purchase from Coffin, with notice of the prior equities of the respondent and his grantors, a fraud upon his rights?

No equitable doctrine is better established than that laid down by Lord Chancellor Hardwicke in *Le Neve v. Le Neve* (2 Ldg. Cases in Equity, 160), over a century and a quarter ago, wherein it was held that the person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.

It was held in *Barnes v. McChristie* (3 Penna. 67), that it was not necessary in any case to constitute notice that it should be in the shape of a distinct and formal communication, and it will be implied in all cases where a party is shown to have had such means of informing himself as

Points decided.

to justify the conclusion that he has availed himself of them. It has frequently been decided by the American, as well as the English Courts, that whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, will operate as notice.

Early in the present century it was held that actual and unequivocal possession was notice, not so much because possession is evidence of actual ownership, as because it is the duty of one who is about to purchase real estate to ascertain by whom and in what right it is held and occupied. And this doctrine is settled beyond dispute, both in England and in the United States.

Carter therefore bought with notice of the prior equities of Bohlman in lots numbered three (3) and four (4) and with notice of the prior equities of Bohlman's immediate grantors in lot numbered two (2), and his purchase was a fraud on their rights. As has already been decided, the equities of Burchard & Powers passed with the land to Bohlman and he can assert them.

It follows that Carter stands in the same position as his grantor. He has the legal estate, but he holds it as the trustee of Bohlman, who is the equitable owner.

The decree of the Court below must be affirmed.

Decree affirmed.

A. M. WITHAM, RESPONDENT, v. JOHN M. OSBURN,
APPELLANT.

VOID STATUTE.—Sections 15, 16 and 17 of Chapter 50 of the Miscellaneous Laws of Oregon authorizing the establishment of private roads over the land of an individual without his consent, for the private use of another, are unconstitutional and void. The Constitution of the State provides that "private property shall not be taken for *public* use without just compensation," which implies that it cannot be taken for *private* use, whether compensation be made or not.

PRIVATE ROADS CANNOT BE CREATED BY LAW.—If a different class of public roads than is now provided for by statute, is needed for the convenience of persons who are so situated as to have no connection with any public highway, the Legislature may provide for their establishment by providing that they shall be public instead of private roads, and that they may be used by the public.

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46	248
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48	90

Argument for Appellant.

APPEAL from Benton County.

This was a suit to enjoin appellant from opening a private road across the land of respondent. The injunction was granted, and appellant brings his appeal.

The other material facts are stated in the opinion of the Court.

R. S. Strahan, John Burnett, and Boise & Willis, for Appellant.

The main objection urged against the constitutionality of §§ 15, 16 and 17 of Chapter 50 of the Miscellaneous Laws is, that the use is not public. Generally it is for the Legislature to determine when and in what cases the public interests require the taking of private property for public use. (Sedgwick on Stat. and Con. Law, 499.)

The question whether the use is public or private, is not a judicial question, but one that rests entirely with the Legislature. (*Bloodgood v. The M. & H. R. Co.*, 18 Wend. 9; 2 Dallas, 304; 2 Blatchford R. 95; 4 Pick. 460; *Spring v. Russel*, 1 Green R. 273; 7 Pick. 453, 466; 1 Am. R. 237, 241.)

The easement acquired under this law is of a public nature. The road, when opened, may be lawfully traveled by all who have occasion to pass over it. The respondent does not acquire any exclusive property in the road, or in the land upon which it is located, as against all other persons. The law is, therefore, free of all constitutional objection. (*Sherman v. Bruck*, 32 Cal. 241; *Metcalf v. Bingham*, 3 N. H. 459; *Allen v. Stephens*, 29 New Jersey L. R. 509; *Brewer v. Bowman*, 9 Georgia R. 37; *Harvey v. Thomas*, 10 Watts, 63; *Pocopson Road*, 16 Penn. State R. 15; *Hays v. Risher*, 32 Penn. State R. 169; 18 Ala. R. 482; 4 Met. Ky. R. 337; 9 Ind. R. 103; 31 Penn. State R. 12; 5 Harrington's Del. R. 21; Id. 448; 11 Rich. Law, S. C. R. 529; 3 Jones N. C. Law R. 23.)

If the law is susceptible of two constructions, one of which will place it in antagonism with the Constitution, and the other will not, that which will not thus place it

Opinion of the Court—Prim, J.

must be adopted. (*People v. Reed*, 6 Cal. 228; *People v. Langdon*, 8 Cal. 11; 7 Pick. 446; Sedg. on Con. Law, 482; 6 Cranch, 87; 5 Cow. R. 564; 3 Denio R. 381; 3 Seld. 109; 19 Barb. N. Y. R. 81; 26 Wend. R. 599; 16 Mass. 245, 269; 3 Scam. 238; 1 Am. Rep. 237.)

This class of roads has been recognized as legal in all the older States except New York, and the same system has been adopted by all the new States without objection. (11 Pick. 423; Washb. Eas. and Servts. 175; 2 Hilliard on Law of Real Prop. 21, 22, 23, §§ 92 to 96 and 100; 11 Mo. 513; 4 Harris, Penn. R. 15.)

The leading case in the State of New York, opposed to this view (*Taylor v. Porter*, 4 Hill, 140), was decided under a statute totally unlike ours.

The fact that the Act in question has been in force ever since the adoption of the Constitution, and has been acquiesced in by Legislatures, Courts, the Bar and the people, without opposition on the ground of its unconstitutionality, is a contemporary interpretation of the most forcible nature. (*Stewart v. Laird*, 1 Cranch, 299; Sedg. on Con. and Stat. Law, 487.)

John Kelsay, Thayer & Williams, for Respondent.

The law giving the right to obtain a private road is unconstitutional and void. (4 Hill, 140; 2 Seld. 368; 14 Johns. 384; Washb. on Eas. 327, § 3; 27 Mo. 374; 3 Comstock, 517; 25 Mo. 261; 11 Barb. N. Y. 30; 39 Ill. 110, 113; Sedg. on Stat. and Con. Law, 174; Smith's Con. of Stat. 477, §§ 325, 326; 25 Iowa, 540; 27 Id. 43; 1 Am. R. 161, 225; 3 Pars. on Con. 537, 542; Washb. on Eas. 401; Goddard on Eas. 52, 179; 24 Wisc. 89.)

By the Court, PRIM, J.:

It is provided by our statute that when any person's land shall be so situated that it has no connection with any public road, he may make application to the County Court for the location of a private road leading from his premises to some convenient public road. When such application is made, the Court shall appoint three disinterested house-

holders to view out and locate such road according to the application; and also to assess and report the damages which may be sustained by the persons over whose lands such road may be located. After three days' notice given to all persons through whose lands such private road is to be located, they shall proceed to locate and mark out a private road thirty feet in width from some point on the premises of the applicant to some point on the public road; such viewers shall also have the power to determine whether or not gates shall be placed at proper points on said road, and assess the damages in accordance with such determination. They shall also make a report to the County Court of the private road so located by them, and also the amount of damages, if any, assessed, and the persons entitled thereto; and if the County Court shall be satisfied that such report is just, and after payment of all cost of locating such road and the damages assessed by such viewers, the County Court shall order such report to be confirmed, and declare such road to be a private road, and the same shall be recorded as such. This is the substance of §§ 15, 16 and 17, of ch. 50, of the Miscellaneous Laws, and those three sections contain all the provisions of the statute upon the subject of locating and opening private roads in this State.

The private road in question was located over the lands of respondent by the County Court, under the provisions of these sections of the statute. It is claimed by respondent that the proceedings of the Court in relation to the location of the road in question are not only irregular and defective in not complying with the provisions of the statute in such cases made and provided, but that they are absolutely void upon the ground that those sections of the statute authorizing such proceedings are unconstitutional and therefore void.

Section 18, of Article I, of the Constitution, provides that "private property shall not be taken for public use * * * without just compensation."

The Constitution of nearly every State in the Union contains a provision in substance like this, which has been generally construed by the Courts to imply that private

Opinion of the Court—Prim, J.

property may be taken for public use by making just compensation to the owner thereof, but that private property cannot be taken for private use whether full compensation shall be made or not.

"All separate interests of individuals in property are held by the Government under the tacit agreement, or implied reservation, that the property may be taken for public use upon paying a fair compensation therefor, whenever the public interest or necessities require that it should be so taken." "The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for full compensation, when the public interest will in no way be promoted by such transfer." (*Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige, 73; *Varie v. Smith*, 5 Paige, 159.)

In *Taylor v. Porter* (4 Hill, 140), it was held that the New York statute, authorizing a private road to be laid out over the lands of a person without his consent, was unconstitutional and void, upon the ground that the Legislature had no authority "to authorize the transfer of one man's property to another without the consent of the owner."

Mr. Justice Bronson says: "The right to take private property, for public purposes, is one of the inherent attributes of sovereignty, and exists in every independent government. But even this right of eminent domain cannot be exercised without making just compensation to the owner of the property. * * * But there is no provision in the Constitution that just compensation shall be made to the owner when his property is taken for private purposes," or if it can be taken at all for private purposes, it can be taken without regard to compensation.

In *Wilkinson v. Leland* (2 Peters, 657), Mr. Justice Story says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. * * * We know of no case in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as

Opinion of the Court—Prim, J.

inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.”

In the *Matter of Albany Street* (11 Wend. 149), Chief Justice Savage said: “The Constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another.”

But, by looking into the cases in which statutes like ours have been upheld, it will be seen that it is admitted that private property cannot be taken for strictly private purposes without the consent of the owner; but it is denied that such statutes, in authorizing the location of private roads, conflict with this general rule. It is insisted that they are not private but *public* roads, and when established may be used by so many of the public as may have occasion to use them. This was the position assumed by the Supreme Court of California, in *Sherman v. Bruck* (32 Cal. 253).

The provisions of the California statute, in relation to the location of private roads, are very similar to ours. In delivering the opinion of the Court, Mr. Justice Sanderson said: “The Legislature has no power to lay out and establish private roads, in the sense that they are to be the private property of particular individuals.” Such action, on the part of the Legislature, it was admitted, would be simply null and void. The Court, however, held the statute to be valid, upon the ground that such roads, when established, were not private but public roads, and might be used as such by the public. But by what process of reasoning the Court arrived at this conclusion we are unable to comprehend. The statute contains no provision indicating that, when established, they shall be public roads, or that they may be used by the public; nor does it contain any provision whereby such roads may be kept open for the use of the public, if the private individual, at whose instance they were established, should see proper to close them. They are not only called private roads in the statute, but are established on the application and at the expense of private individuals.

Points decided.

Bouvier (2 vol. 488) says: "Private roads are such as are used for private individuals only, and are not wanted for the public generally. Public roads are kept in repair at the public expense, and private roads by those who use them." Thus it will be seen that the private roads provided for in our statute, correspond very well with Mr. Bouvier's definition of "private roads."

It has been argued that many persons are so situated as to have no connection with any public highway, and that such persons will be put to great inconvenience, unless private roads can be established for the use and benefit of such persons. In answer to this argument, we would suggest that the Legislature may meet the necessity by providing for the establishment of a different class of public roads than are now provided for by law. The Legislature, undoubtedly, has authority to authorize the taking of private property for the establishment of as many public roads as may be needed for public use. The Courts, in sustaining that class of roads called private roads, have been compelled to assume that they were public roads, although called private roads in the very Act in which they are provided for.

Having reached the conclusion that the Legislature exceeded its authority under the Constitution, in authorizing the establishment of private roads over the land of an individual, without his consent, for the private use of another, we therefore hold that so much of such statute as authorizes the location of such roads, is void.

It is therefore ordered that appellant be perpetually enjoined from further proceeding in the matter of the location of said private road over the land of respondent.

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23* 894

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STATE OF OREGON, RESPONDENT, v. SAMUEL
VOWELS, APPELLANT.

MAYHEM.—Any offense made punishable by § 527 of the Criminal Code, may be denominated mayhem in indictments.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

• *George H. Durham, District Attorney, C. A. Ball and S. C. Simpson, for Respondent.*

W. W. Page and W. W. Thayer, for Appellant.

By the Court, McARTHUR, J.:

The indictment in this case charges Samuel Vowels with the crime of mayhem, alleged to have been committed as follows: "The said Samuel Vowels, on the 25th day of December, 1870, in the county of Multnomah and State of Oregon, did purposely, maliciously, and feloniously, tear off the left ear of Joseph Taylor."

The only question to be considered arises upon the sufficiency of the indictment to support the conviction had thereon in the Court below. It is contended, by counsel for appellant, that under §§ 69 and 70 of the Criminal Code, the crime charged to have been committed must be named in the indictment, if it have a name, or, if it have no general name, it must be indicated by a brief description, as given by law. Of the correctness of this position there can be no doubt. But it is further urged that there is no such crime known to the laws of Oregon as the crime of "mayhem." Of this let us inquire.

The indictment herein is based upon § 527 of the Criminal Code, which provides that "if any person shall purposely and maliciously, or in the commission or attempt to commit a felony, cut or tear out or disable the tongue, or put out or destroy the eye, or cut or slit or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable the limb or member of another, such person, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for not less than one nor more than twenty years." It may not be amiss to state that this section is based upon the English statute of 22 and 23 Car. II, ch. 1, commonly known as the Coventry Act, the circumstances which led to the passage of which are recounted by Lord Macaulay (Hist. Eng., vol. i, 8vo. ed. p. 77).

 Points decided.

Although the crime of tearing off the ear of another is not embraced within the crime of mayhem, as known to the common law, and although our Courts have no right to assume jurisdiction of common law offenses not included in our Criminal Code, yet we conceive the ground taken by appellant's counsel to be untenable, for the reason that the crimes made punishable by the section cited are, by the Criminal Code itself, declared to be mayhem. The Criminal Code, fully chapterized, sectionized, and, with the syllabi of the different chapters, was submitted to the Legislative Assembly, and, by that body, passed in exactly the shape in which it now stands upon the statute-book. These syllabi became parts of the law, and furnish the highest source from whence to draw information in relation to the nomenclature of the said Code. In the syllabus of chapter 2, § 527, is referred to as describing the crime of mayhem, and prescribing the punishment therefor. We are, therefore, of opinion that any offense made punishable by said section may, in the indictment, be denominated mayhem.

It follows that the judgment of the Court below must be affirmed.

Judgment affirmed.

JAMES W. KING AND J. P. O. LOWNSDALE, ADMINISTRATORS OF ESTATE OF WM. M. KING, DECEASED, RESPONDENTS, v. HAMILTON BOYD, APPELLANT.

OBJECTIONS NOT WAIVED BY FILING ANSWER.—Objections to the jurisdiction of the Court and to the sufficiency of the complaint to constitute a cause of suit, are not waived by answer to the merits.

ADMINISTRATOR—AUTHORITY TO SUE.—An administrator has no authority to institute a suit to set aside a conveyance of real estate made by his decedent in his lifetime, without leave first had and obtained from the County Court or Judge thereof.

IDEM—RIGHT TO POSSESSION OF REAL ESTATE OF DECEDENT.—The right of an administrator to the possession of the real estate of his decedent is temporary, and is limited to the purposes of administration. It would be an unsafe rule to allow an administrator of an estate upon his own motion and without any showing of a necessity therefor, for the purposes of administration, to engage in litigation concerning the title to the realty of an estate. In such cases the heirs at law are the real parties in interest, and should be allowed to control such litigation.

Statement of Facts.

APPEAL from Multnomah County.

On the 9th day of November, 1869, Wm. M. King, a resident of the city of Portland, died intestate, and respondents, James W. King and J. P. O. Lownsdale, were, on the 4th day of February, 1870, duly appointed administrators of his estate.

On the 8th day of October, 1869, said Wm. M. King, for the expressed consideration of \$3000, conveyed by deed of warranty lots Nos. 1, 2, 3 and 4 in block No. 221, in the city of Portland to appellant Boyd.

Respondents allege that appellant fraudulently obtained the execution of said deed; that said King at the time of such execution was very old and infirm, both in body and mind, and was so imbecile in mind that he was not legally capable of contracting or of properly transacting business. That appellant Boyd, well knowing the same, took advantage thereof to overreach and defraud said Wm. M. King out of said lots, and that in fact he only paid thereon the sum of about \$136.66, the same having been paid by appellant since the death of said Wm. M. King for certain improvements on a street adjacent to said lots. Respondents further allege that the price agreed to be paid by said Boyd for said lots was greatly inadequate; said lots being at the time of said pretended sale worth \$5000. That before the commencement of this suit they (respondents) tendered to said Boyd the sum of \$136.66, paid out by him as aforesaid, with interest thereon since the date of said deed, and demanded a reconveyance of said lots, all of which appellant refused.

The complaint concludes with a prayer for a decree of the Court setting aside said deed as fraudulent and void, etc.

The defendant demurred to the complaint on the grounds that (1) it does not state facts sufficient to constitute a cause of action, and (2) it appears from the complaint that the plaintiffs have not legal capacity to sue.

This demurrer was overruled by the Court, and defendant filed his answer, denying substantially the material allegations of the complaint. The issues of fact were submitted

Argument for Appellant.

to a jury, which returned a special verdict in favor of the plaintiffs, on which a decree was rendered by the Court for the relief prayed for in complaint.

Defendant appealed, assigning errors as occurring during the course of the trial, but upon the argument in this Court relied only on the questions of law raised by the demurrer, which it is claimed were not waived by the answer.

D. Logan, for Appellant.

It does not appear from the pleadings or evidence that Boyd was ever in possession of the property in controversy, or that he ever kept respondents out of possession or from taking possession.

At common law administrators have no concern with the real estate of their intestate. So far as they have or ever had any control over real estate, it is in consequence of positive enactment. (3 Ohio, 556.)

The first modification of the common law gave the administrator power to sell the real estate for the payment of debts; but this power (Civ. Code, § 1113) gives no right to its possession or control by the administrator (16 N. Y. 281, 283). Our statutes have given this additional right to the executor or administrator (Civ. Code, § 1088).

But this provision only gives a possessory right to the administrator for the purposes of the administration. The seizin is in the heirs from the moment of the death of the intestate, subject to the possession of the administrator, and to be divested by a sale for the payment of debts, as clearly appears from § 1160 of the Civil Code: "The real property of the deceased is the property of those to whom it descends by law, or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as in this chapter provided."

Thus, with the exception thus stated, the special character of the administrator, as known to the common law and familiar statutes, is still preserved. Beyond the rights of action that may arise to the administrator from the right to the possession and control, his rights and powers must

Opinion of the Court—Bonham, J.

remain the same as they were before, and as he could not previously maintain an action, either in law or equity, for the recovery or maintenance of either possession or title, so his right to the possession only enlarges his right of action to that extent; and it must still be held not his province to vindicate or clear up, or remove adverse claims to title. (*Smith v. McConnell*, 17 Ill. 142; 23 Mo. 99; *Streeter v. Patton*, 7 Mich. 350; 11 Id. 382.)

An administrator suing must have a cause of action as *administrator*. He does not represent the heirs or their interests. He has but a naked interest in the possession of the real estate coupled with a power to sell. His duties are strictly limited and defined, and his rights of action cannot be broader.

Hill, Thayer & Williams, and J. H. Reed, for Respondents.

This suit is properly brought by the administrators, they being entitled to the possession and control of the real as well as the personal property of the deceased until administration is complete. (Civil Code, § 1088; *Curtis v. Sutter*, 15 Cal. 259; *Teschemacher v. Thompson*, 18 Cal. 20; *Harwood v. Marye*, 8 Cal. 580.)

By the Court, BONHAM, J.:

Although after the overruling of the demurrer, an answer filed in this case and a trial had upon the merits, resulting in favor of the claim of respondent, yet it is conceded that if the demurrer was in the first place well taken, it may be insisted upon, and would operate as a reversal and a dismissal of this cause upon appeal. (Civil Code, § 70.)

The question in this case is, has an administrator authority, by virtue of his office or position as such, to litigate questions of title, concerning the real estate of his decedent, upon a showing such as is set out in plaintiff's complaint?

It is claimed by counsel for respondents that an administrator has such authority, derived from § 29 of the Civil Code, and from the other sections of the statute, cited by

Opinion of the Court—Bonham, J.

them in their brief, defining the powers and duties of executors and administrators. On the other hand it is urged, by counsel for appellant, that the only authority over or concern with the real estate of his decedent which an executor or administrator possesses is derived from statute, and is limited to his right to the temporary possession of the same during the course of administration for the purpose of preserving the land from waste, with the right to temporarily lease the same and collect the rents and profits, and, if necessary, after exhausting the personal assets, upon a proper showing, to obtain an order from the County Court to sell the same, or so much thereof as may be necessary to pay claims against the estate and expenses of administration.

The authority of an executor or administrator, over the real estate of his decedent, being in derogation of the common law, we think is, and ought to be, strictly limited to his rights and powers as created and defined by statute. And we think it would be an unwise and unwarranted construction of the authority of executors or administrators to infer from any language found in the statute on that subject that they might, upon their own motion, institute suits to set aside conveyances, or remove clouds from titles to real estate, without any showing as a condition precedent, that the possession of the same was wrongfully withheld, or that there was any necessity for selling the same, or any part thereof, to satisfy claims against the estate.

The *rule*, as declared by our Practice Act, and conclusively sustained by reason, is that all actions or suits shall be prosecuted in the name of the real party in interest. There can be no question about the wisdom of this rule, and it should be strictly adhered to in all cases which do not come within the exceptions to it, as declared by statute.

No one is better qualified to litigate the title to real estate than the person who owns it. An administrator who has no direct interest in the result of a suit, who personally loses nothing if the suit be injudiciously instituted and adversely determined, is not as safe a person to entrust with the right to litigate as he who is the owner of the property

which is the subject of litigation and the one who must suffer if the determination of the cause be adverse to him. A due regard for the rights of both heirs and creditors of estates, we think, demands that the limitations of our statute, on the authority of executors and administrators, to institute suits, affecting the title to real estate, should be carefully guarded so that estates may not be subject to be consumed by the costs and expenses of ill-advised lawsuits.

In this case, whatever the facts may have been, so far as anything appears in the pleadings, or any of the proceedings, Boyd, the appellant, never wrongfully or otherwise withheld the possession of the land in controversy from the administrators, and there was no occasion or necessity for the sale of the same, or any part thereof, to pay claims against the estate. In the absence of any showing, by the administrators, that there was some necessity for their interference with the lots in question, for some purpose of administration, recognized by the statute, they had nothing to do with the same, and it was by the law the absolute property of the heirs of Wm. M. King, to whom it descended.

But there is another provision of our statute on this subject which is not referred to in the briefs of counsel which we think is conclusive of this case. Section 1135 of the Code reads: "Whenever the assets of the estate are insufficient to satisfy the funeral charges, expenses of administration, and the claims against the estate, and the deceased shall in his lifetime have made or suffered any conveyance, transfer or sale of any property, real or personal, or any right or interest therein with intent to delay, hinder or defraud creditors, or when such conveyance, transfer or sale has been so made or suffered, that the same is void in law as against creditors, or when the deceased in his lifetime has suffered, consented or procured any judgment or decree to be given against him with such intent, or in such manner as to be likewise void, it is the duty of such executor or administrator to make application by petition to the County Court or Judge thereof for leave to commence and prosecute to final judgment or decree, the necessary and proper

actions, suits or proceedings, to have such conveyance, transfer, sale, judgment or decree declared void, and the property affected thereby discharged from the effect thereof." (Civ. Code, §§ 1136, 1137.)

The object and effect of § 1135 of the Code as above quoted, we are clearly of the opinion is to declare that an executor or administrator shall not, upon his own motion, and without any showing of a necessity therefor, for the purposes of administration, institute or maintain suits to determine questions affecting the title to the real estate of decedent.

We think that appellant's demurrer was well taken, for the reason that the complaint does not state facts sufficient to constitute a cause of suit in respondents as administrators of the estate of Wm. M. King, deceased. And the decree of the Court below should be reversed and this cause dismissed without prejudice.

JULY TERM, 1873.



REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
JULY TERM, 1873.

BARTLETT WHITLOW v. GEORGE H. REESE ET AL.

COUNTIES CANNOT PRE-EMPT LAND IN THIS STATE UNDER THE ACT OF CONGRESS OF MAY 26TH, 1824.—The Act of Congress of May 26th, 1824, "granting to the counties or parishes of each State or Territory of the United States, in which the public lands are situated, the right of pre-emption to a quarter section of land for seats of justice in the same," was never in force in this State. Neither was the Town-site Act of May 23d, 1844, in force in this State prior to July 14th, 1854.

APPEAL from Yamhill County.

The facts are stated in the opinion of the Court.

Boise & Willis, Curry & Hurley and J. N. Dolph, for Appellant.

P. C. Sullivan and James McCain, for Respondents.

By the Court, MOSHER, J.:

The plaintiff in this suit seeks to quiet the title to a tract of forty acres of land, of which he is in possession, and which he claims is a portion of the east half of the donation

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land claim of Joel Perkins and wife. He derives his title from Laura A. Patterson, widow of said Perkins. The defendants, George H. Reese and wife, claim that the tract in dispute is a part of the west half of said claim, to which they deraign title from the heirs of said Perkins. The east half has been patented to Laura A. Patterson, the widow, and the controversy arises from the fact that one hundred and sixty acres of said claim, including the site of the town of Lafayette, has been patented to the Board of Commissioners of Yamhill County, thus changing the division line. If Perkins and wife were entitled to a patent for the whole claim of six hundred and forty acres, the title to the tract in dispute is in the plaintiff, but if the County Commissioners can hold the town site, it is in the defendants.

The facts appearing in evidence are, that in 1845, Joel Perkins purchased the claim, on which there was then a log-cabin, from one John Copenhagen, and lived on it, at intervals, until September, 1848, when he went to California. He returned in June, 1849, and resumed his residence. In July, 1850, he was married to Laura A. Hawn, now Laura A. Patterson. On the 8th of October, 1852, he filed in the office of the Surveyor-General of Oregon a notification on six hundred and forty acres, under the fourth section of the Act of 27th September, 1850, known as the Donation Act, and made proof of residence and cultivation from the 30th of June, 1849. On the 8th of April, 1854, he made his final proof of continued residence and cultivation up to that date. Having proved to the satisfaction of the Register and Receiver of the Land Office, a compliance with the conditions of the law, on the 30th of October, 1869, a certificate was issued by them to the widow and heirs at law, for the said tract, with the exception of the town site, in which the east half was designated for the widow. It is admitted that a patent was subsequently issued in accordance therewith.

The defendants have attempted to prove an abandonment by Perkins of that part of the claim included in the town site, and for this purpose introduced a copy of a quit-claim deed, dated 11th May, 1850, signed by Joel Perkins and

one Johnson, to the Board of Commissioners of Yamhill County, for the town plat of Lafayette, but it has only one witness, and is not acknowledged, nor has its execution been proved. What effect this paper might have had on the question, if properly proved, is, however, destroyed by the subsequent notification of Perkins in 1852, and by the positive proof of residence on, or cultivation of, this part of the tract during the whole term of four years.

On the 19th April, 1858, the Board of Commissioners of Yamhill County, having previously obtained the permission of the Commissioner of the General Land Office therefor, entered at the Land Office at Oregon City one hundred and sixty-three and sixty-four one-hundredths acres and received a certificate, upon which, it is admitted, a patent subsequently issued. The patent not having been produced in evidence, there is some doubt as to the Act under which this entry was permitted. In a letter dated 28th December, 1859, the Commissioner writes: "In the case of the town, the Board of Commissioners for Yamhill County were permitted to make an entry under the town-site law of 23d May, 1844." He also refers the claim to the town-site law under the date of 24th October, 1868. If this is the fact the question is no longer an open one. The Supreme Court of the United States have decided that the Act of 23d May, 1844, was not in force in Oregon prior to the 14th July, 1854. (*Stark v. Starr*, 6 Wall. 402.)

"Although the town-site law was in force in Oregon in the year 1858, when this entry was made, no land could be appropriated under it for the benefit of occupants of town sites, which had already been granted to others by the terms and conditions of the Donation Law. The Donation Law is a grant in the present, and gives the fee-simple to every settler who avails himself of its provisions from the date of his settlement. True, until the completion of the subsequent conditions of residence and cultivation and proof thereof, it is an estate upon condition, what is known at common law as a base or conditional fee, subject to be defeated or lost by a failure to perform the conditions upon which it is held. But it is an estate in fee nevertheless,

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and upon the completion of the residence and cultivation, or other conditions, it becomes absolute and unqualified." (*Chapman v. School Dist. No. 1*, 1 Deady, 113.)

Perkins had completed his four years' residence and cultivation on the 30th June, 1853, before the town-site law was extended to Oregon; hence the entry by the County Commissioners and the patent under it was, in the language of Judge Deady, without color of law or authority, and simply void.

It is claimed in the argument, although we do not find any evidence of the fact, that this entry was made under the Act of 26th May, 1824, entitled "An Act granting to the counties or parishes of each State or Territory of the United States, in which the public lands are situated, the right of pre-emption to a quarter section of land for seats of justice in the same." This Act was never in force in this State. In organizing the Territory of Oregon by the Act of 1848, Congress declared that the laws of the United States should be in force in said Territory, "so far as the same or any provision thereof may be applicable." It has never been held that this provision had the effect of extending over the State any portion of the land system of the United States in advance of the public surveys, upon which that system rested, and without which, as the law then stood, that system was inoperative. (*Stark v. Starr*, *supra*.)

Congress passed no law in anywise affecting title to lands in Oregon Territory till 27th September, 1850. (*Lovnsdale v. Parrish*, 21 How. 290.)

The Supreme Court of the United States, as we have before stated, have decided that this Act did not extend to Oregon either the Pre-emption Act of 1841, or the Town-site Act of 1844. The County-seat Act of 1824 is a part of the land system in force at that time, which has never, by any other Act, been extended to this State.

The patent to the County Commissioners for the town site being void, the only remaining question is as to the residence and cultivation of Perkins on this portion of the tract. His notification included the whole of the six hundred and forty acres, and his proof, which was satisfactory to the Commis-

Points decided.

sioner of the General Land Office, extended over the whole tract. That officer based his refusal to extend the patent, not upon a failure of residence and cultivation, but upon the supposed conveyance by Perkins & Johnson, in May, 1850. This opinion is unquestionably erroneous. If the deed referred to had been legally executed and proven, which it is not, still it would not be binding upon the estate afterwards acquired by Perkins under the Donation Act. This would be a proper construction of the law in case of a conveyance with covenants of warranty, or any express stipulation or agreement from which it would reasonably appear that the parties dealt and bargained with reference to the possibility or contingency of the grantor or vendor acquiring title from the United States; but a simple quit-claim by Perkins during his occupancy and before the passage of the Act granting the land, would in nowise affect the after-acquired estate in the premises. (*Chapman v. School District No. 1*, 1 Dedy, 150.)

The Court, therefore, finds that Perkins was entitled to a patent for the whole tract, as described in his notification, according to his claim survey, and that the division line, as claimed by the plaintiff, is the correct one.

Decree for plaintiff.

T. J. CARTER AND O. P. MASON, RESPONDENTS, v.
THE CITY OF PORTLAND, APPELLANT.

DEDICATION.—A dedication to public use may be by parol as well as by deed.

IDEM.—To constitute a dedication by parol, there must be some act or acts proved, evincing a clear intention to devote the premises to the public use.

IDEM.—WHAT CONSTITUTES.—If one owning lands or having an equitable interest therein (subsequently acquiring the title thereto), lays out a town thereon, and makes and exhibits a map or plan thereof, with spaces marked streets, alleys, public squares, parks, etc., and sells lots with clear reference to said map or plan (though unrecorded), the purchasers of lots in said town acquire, as appurtenant thereto, every easement, privilege and advantage which the map or plan represents as part of the town. Upon the sale of lots with such reference to the map or plan, the dedication of the spaces marked streets, alleys, public squares, parks, etc., becomes irrevocable.

4 339
5 381
16 506
20 186
19* 613
25* 387

4 339
23 183
31* 480
4 339
39 214

4 339
41 259
4 339
42 616
4 339
44 176

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ACCEPTANCE AND USE.—Formal acceptance by the corporate authorities is not necessary. Where the dedication is irrevocable, it need not be followed by immediate and continued use.

NOTICE.—Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, or of the public, so as to put him on inquiry into ascertaining their nature, will operate as notice.

IDEM.—Notice should, with rare exceptions, be implied where one is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

W. W. Page, W. W. Thayer and O. P. Mason, for Respondents.

R. Williams, for Appellant.

By the Court, McARTHUR, J.:

This suit was originally instituted in the Circuit Court of the State of Oregon for Multnomah County, to quiet the title to certain parcels of land situate in the city of Portland. The plaintiffs had a decree, enjoining the defendant from disturbing them in their enjoyment of the premises described in the complaint, and from setting up further claim thereto; and also for sixty dollars damages and for costs and disbursements. The cause is in this Court at this time to be tried *de novo*, upon the transcript and the depositions certified up therewith.

The complaint alleges in substance, that the plaintiffs are the owners in fee simple, and in possession of blocks numbered 280 and 281, in the city of Portland, county of Multnomah and State of Oregon. That the defendant claims an interest or estate in said blocks adverse to plaintiffs, viz.: That said property was dedicated by some former proprietors of the city of Portland for public use, and that the said claim is a cloud upon plaintiffs' title. That on January 21, 1869, the defendant, under its said claim, wrongfully and unlawfully broke and entered upon said premises and broke and threw down plaintiffs' fence, enclosing the same, and damaged plaintiffs in the sum of one hundred dollars. That

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on February 6, 1869, the defendant again wrongfully and unlawfully broke and entered the said premises and again tore down said fence, and damaged the plaintiffs in the further sum of one hundred dollars, and that the defendant threatens to repeat the said alleged wrongful acts. Wherefore, they pray that the title may be quieted in them; that the defendant be perpetually enjoined from repeating the said wrongful acts, and that they have and recover the amount of damage as alleged.

The defendant answered, denying the plaintiffs' possession, and alleging the said property to be public parks, claiming that the same had been dedicated by the former proprietors of said city, viz.: Stephen Coffin, W. W. Chapman and D. H. Lownsdale, who, in 1850, were the owners and in possession, and who caused two maps of said city to be made by one Brady. That these two maps were copies of the original plat of the city of Portland, made by the proprietors, upon which the real property in controversy was marked out and designated as the public parks. That said Coffin kept and retained one of these copies, and made frequent sales of lots and blocks of land in said city by reference thereto. That the city of Portland adopted said map in 1852, and that Coffin ratified it after that date. That in 1862 Coffin obtained from the General Government a patent for the land taken by him under the Donation Act of September 27, 1850, which embraced the premises described in the complaint. That the plaintiffs fraudulently combined and confederated with said Coffin to obtain and recover from said city the said parcels of land dedicated to the public use. That on December 4, 1867, said Coffin, combining and confederating with the plaintiffs, fraudulently made and published a map, or plat, designated as "Coffin's Addition to the City of Portland." That on this map the parcels of land in controversy were numbered as blocks usually are upon town plats. That on all prior maps the said parcels of land remained unnumbered, and were designated as public parks. That said pretended map was executed by said Coffin before the plaintiff Mason, who signed his name thereto as a witness, and who, be-

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ing a notary public, took the acknowledgment of Coffin and wife thereto. That the said map was recorded in the record-book of deeds of Multnomah County, Oregon. That on December 28, 1867, the plaintiffs, having a full knowledge of all the facts alleged in the answer in relation to the dedication, obtained from Coffin and wife a deed purporting to convey to them the parcels of land in controversy, together with other parcels of land in said city of Portland, for and in consideration of the expressed sum of \$3000. The defendant charges that the said plaintiffs did not pay said consideration, but that all the acts of plaintiffs and of Coffin, in relation to the transfer of said property, were fraudulent, and therefore void, as against the city, and all private persons, who purchased lots or blocks of said Coffin, prior to the making of the last-mentioned map.

The reply of the plaintiffs puts in issue the material allegations of the answer, and further alleges that they had purchased the property in good faith and for a valuable consideration, and without any knowledge, information or notice of the same having been dedicated to the public; that the map called "Coffin's Addition to the City of Portland," is the only map of record of said property; that the Brady map was never of record, and that neither of the plaintiffs had any knowledge of the existence of any such map or plat until long after their said purchase; that said Coffin was the owner of said blocks, and that plaintiffs, nor either of them, had any knowledge that there ever had been a dedication of, or an attempt to dedicate, the said property to public use.

The first question to be determined in this case is, did Stephen Coffin, the original owner of the land, and one of the proprietors of the town, dedicate these parcels of land to the public use, as alleged by the defendant in the answer?

Beardsley, J., in the case of *Hunter v. The Trustees of Sandy Hill* (6 Hill, 407), has furnished the most comprehensive definition of dedication to be found in the books, and he declares it to be "the act of devoting or giving property for some proper object, and in such manner as to

conclude the owner." It is a well-settled principle of the common law that property may be dedicated to the public use, and that the dedication may be by parol as well as by deed. (*Barclay v. Howell's Lessee*, 6 Pet. 498; *Dummer v. Jersey City*, 1 Spencer (N. J.), 86; *State v. Catlin*, 3 Vt. 530; *McKee v. St. Louis*, 17 Mo. 184; *Hunter v. Sandy Hill*, 6 Hill, 407; *Post v. Pearsall*, 22 Wend. 425, 454; *Dover v. Fox*, 9 B. Mon. 200.) It is also well settled that, to constitute a dedication by parol, there must be some act or acts on the part of the owner evincing a clear intention to devote or dedicate his property to some proper public use or private object. It becomes necessary, therefore, to ascertain from the testimony whether the acts of Coffin, if any he performed, evince a clear intention to dedicate the premises in controversy to the public use. In this connection it is proper to state that we have not regarded any of the testimony tending to prove the acts of Coffin, performed before the passage of the Donation Act, except that showing his participancy in procuring a survey, and in causing a certain map of the city of Portland to be made by one Short, and two copies thereof to be made by one Brady. The acts of Coffin, performed prior to September 27, 1850, the date of the Act referred to, standing alone, could not, in this case, be admitted to establish a dedication. The evidence of the dedication must be found, if at all, in the acts performed subsequently to that time, and the above exception is made for the reason that it is clearly proved that Coffin used one of the copies of the Short map, made by Brady, in describing and referring to lots and blocks in the city of Portland, sold by him after the passage of the Donation Act, and also after he had obtained his patent from the General Government in 1862.

The following facts are clearly established by the testimony: That during the year 1850, Stephen Coffin, Daniel H. Lownsdale and Wm. W. Chapman were in possession, and claimed to be the owners of what was known as "The Portland Land Claim." That in that year, and before the passage of the Donation Act, they caused a survey to be made of blocks, lots, streets, parks and other public

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grounds of the city of Portland, and portions thereof were designated upon the ground by stakes and monuments. That they caused a map thereof to be made by one Short, and upon said map the parcels of land described in the complaint were designated, with others, as public parks, and were unnumbered. That prior to the said survey and mapping, there were settlements made upon the "Portland Land Claim" for the purposes of trade and commerce. That the said city was duly incorporated as a body politic for municipal purposes, by Act of the Legislature of the then Territory of Oregon, dated January 23, 1851, and has ever since remained incorporated. That in 1850, John Brady, by the order of Coffin, Lownsdale and Chapman, made two copies of the original map or plat of the city made by Short, upon both of which copies the property described in the complaint was marked and designated as public parks, and the spaces were unnumbered. That Coffin took possession of one of the copies made by Brady, and made sales of lots and blocks according to the same, up to December, 1867. That in April, 1852, the city of Portland, by its Common Council, adopted the map or plat drawn by Brady as the official map or plat of the city, and this act was known to said Coffin. That Coffin adopted, exhibited and used the Brady map from the time it was made, and after the date of the passage of the Donation Act, and after the adoption of the said map by the said City Council, and made sales of lots and blocks as designated on the same. That subsequently to the passage of the Donation Act, and prior to December 4, 1867, the date of the making of a certain map to be presently mentioned, Coffin sold certain lots of land on the blocks lying opposite to and facing the public parks, at the same time informing the purchasers that the lots purchased were situated adjacent to the public parks. That on December 4, 1867, Coffin made, published and recorded a map or plat designated as "Coffin's Addition to the City of Portland," attached to which was a written instrument explanatory thereof, by which he donated to the city all the streets as shown by said map or plat, and that on this map or plat the parcels

of land lying between East and West Park streets, which parcels of land were designated on the previous maps as public parks, were numbered respectively as blocks 276, 277, 278, 279, 280, 281 and 282.

The facts being as stated, we will proceed to an examination of the principles of law applicable thereto, in order to ascertain whether the acts of Coffin can be properly regarded as evincing a clear intention to dedicate, and whether the dedication when made became irrevocable.

In the *United States v. Chicago*, 7 How. (U. S.) 185, the principle is laid down that a mere survey of land, by the proprietor thereof, into lots, streets and squares, will not amount to a dedication without a sale, and it is well settled, by the weight of authority, that a sale of lots or blocks with reference to a given map or plat describing lots and blocks as bounded by streets, will amount to an immediate and irrevocable dedication of the streets. (*Rowan's Exrs. v. Portland*, 8 B. Mon. 232; *Augusta v. Perkins*, Id. 207; *Newport v. Taylor*, 16 B. Mon. 699; *Stone v. Brooks*, 35 Cal. 489; *Hannibal v. Draper*, 15 Mo. 634; *Schenley v. Commonwealth*, 36 Penn. St. 62; *Dubuque v. Maloney*, 9 Iowa, 450; *Winona v. Huff*, 11 Minn. 119; *Huber v. Gazley*, 18 Ohio, 18; and *Logansport v. Dunn*, 8 Ind. 378.)

The same doctrine applies to public squares and parks, and the dedication may be established in the same manner as in case of streets and alleys. (*Commonwealth v. Rush*, 14 Penn. St. 186; *Dover v. Fox*, 9 B. Mon. 200; *State v. Wilkinson*, 2 Vt. 480; *Watertown v. Cowen*, 4 Paige (N. Y. Ch.), 510; *Price v. Thompson*, 48 Mo. 363; and *Abbott v. Mills*, 3 Vt. 526.)

In the last case referred to it was held that whenever a public square or common is marked out or set apart as such by the owners, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietors that it should so remain; or even if there are no marks upon the ground, but a map or plan is made, and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart and appropriating them to any other use.

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We are of opinion that if one owning land, or having an equitable interest therein, and subsequently acquires the title thereto, lays out thereon a town, and makes and exhibits a plan thereof with spare ground marked as streets, alleys, public squares or parks, and sells lots with clear reference to that plan or map, the purchasers of the lots acquire as appurtenant thereto every easement, privilege and advantage which the plan or map represents as part of the town. (*Dovaston v. Payne*, 2 Smith's Ldg. C. 224, 225; *Rowan's Exrs. v. Portland*, 8 B. Mon. 232, 237; *Barclay v. Howell's Lessees*, 6 Pet. 206, 207; *United States v. Chicago*, 7 How. U. S. 196; *Cincinnati v. White's Lessees*, 6 Pet. 431; *Drubque v. Maloney*, 9 Iowa, 455; *Godfrey v. Alton*, 12 Ill. 35; *Asken v. Wynne*, 7 Jones N. C. 22; *Wilder v. The City of St. Paul*, 12 Minn. 203, 204, 211; *Trustees of M. E. Church of Hoboken v. Hoboken*, 33 N. J. Law, 21.)

From the facts and the law as stated, we are of opinion that Coffin made a dedication by parol of the parcels of land described in the pleadings to the public, to be used as public parks, and that the said dedication was subsequent to the date of the passage of the Donation Act, and prior to the date of the execution of the map known as "Coffin's Addition to the City of Portland," and also prior to the date of the execution of the deed of Coffin and wife to the plaintiffs, under which the plaintiffs claim.

We pass now to the consideration of the questions of acceptance and user; for it is claimed by plaintiffs' counsel that nothing less than a formal acceptance, by the corporate authorities, of these particular parcels of land, or an actual entry upon, use and improvement thereof, by said corporate authorities, will amount to an acceptance, and that an acceptance was necessary to make the dedication irrevocable.

The facts tending to show an acceptance on the part of the city are the following: That on April 29, 1852, the City Council, by proper resolution, adopted the Brady map as the city map or plat, and ordered the Mayor to appoint a special committee, with instructions to call upon the proprietors of the city of Portland, and obtain from them a bond for or deed of all the public streets in said city, and a deed

of trust for all the lands donated to benevolent societies, public schools, public squares, etc. That a copy of the said map was made for the public use, that the same was kept and used by the city, and that on March 28, 1866, an ordinance was passed by the City Council, authorizing the Committee on Streets and Public Property to contract for the improvement of the public parks west of Seventh and south of Salmon streets, which includes the land in controversy.

If the position assumed by plaintiffs' counsel be correct, there could be no dedication to an unincorporated town or village, either by deed or in parol. The law is, that a parol dedication is not a grant; it is a right created in favor of the public, and is in the nature of an *estoppel in pais*. There need be no grantee *in esse* to take the fee, nor is it essential that the legal title should pass from the owner. (*Beatty v. Kurtz*, 2 Pet. 256; *New Orleans v. United States*, 10 Pet. 662; *Dubuque v. Maloney*, 9 Iowa, 450; *Kelsey v. King*, 33 How. Pr. 39; *Town of Pawlet v. Clark*, 9 Cranch, 292; *McConnell v. Lexington*, 12 Wheat. 582.)

In *New Orleans v. United States*, just cited, the Court says that it is not essential that this right of use should be vested in a corporate body; it may exist in the public and have no other limitation than the wants of the community at large. We are of opinion that the acts of the city, by its council, show an acceptance on its part of the parcels of land in controversy, if such formal acceptance were necessary. But a formal acceptance is not necessary. The acts of the inhabitants in the purchase of lots, the improvement of streets, etc., and their use, conclude the owner, and the corporation may insist upon every right which any of its inhabitants may have acquired by virtue of the original dedication. (*Watertown v. Cowen*, 3 Paige (N. Y. Ch.), 514; *Dovaston v. Puyne*, 2 Smith's Ldg. Cases, 237, 241; *Wyman v. Mayor of New York*, 11 Wend. 499; *Langley v. Gallipolis*, 2 Ohio St. 107; *New Orleans v. United States*, 10 Peters, 713.)

The purchase of lots and improvement of streets, with reference to the Brady map or plat, were acts of acceptance of the streets and other public places, and indeed of the

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entire plan of the city as displayed upon the map. The fact that the city had not, before the alleged purchase by plaintiffs, used and improved the parcels of land in controversy, cannot redound to the advantage of the plaintiffs. It was not necessary that these particular pieces or parcels of land should have been improved or used prior to said alleged purchase in order to entitle the city to hold them. They were shown by the map adopted by Coffin, and by the city, to be public parks, and numerous and valuable private and public improvements were made with reference thereto, and thereby the dedication became irrevocable. As regards the improvement and use of public parks or squares, in like situation, it is sufficient if they are put to the use to which they are dedicated when the public convenience requires. In *Rowan's Exrs. v. Portland*, above cited, a case somewhat analogous to the one under consideration, the Court says that: "The dedication having been made and proved by the map, and the sales and conveyance of lots with reference to it, did not require a subsequent user to establish or prove it, and we are not sure that it could have been defeated or lost by non-user even for twenty years, except so far as it was ousted by an adverse use for that period. To say that a dedication to the use of the future town and of the public, made when the site of the town was in a state of nature, would be lost if not followed by immediate and continued use, or should be limited to the extent to which it was thus used, would deprive the dedication of its intended value and would make it a mockery." The local authorities or the corporate guardians are the ones whose duty it is to improve, adorn and embellish the public parks, and where the dedication is irrevocable, as we hold it to have long since become in this case, they are the judges as to the time when the public health and public pleasure demand the use and enjoyment of the lands dedicated. The original owner, though he has the *naked fee*, has no right whatever to interfere with the premises except where the use becomes absolutely impossible, or where the corporate authorities seek to put the premises to some other use than that to which they were originally dedicated.

Then he, as well as any lot-holder of the city, may proceed in equity to enforce the use according to the original dedication. (*Barclay v. Howell's Lessees*, 6 Pet. 498; *Williams v. The Church*, 1 Ohio St. 478; *Webb v. Moler*, 8 Ohio, 552; *Board, etc., v. Edson*, 18 Ohio St. 221; *Harris v. Elliott*, 10 Pet. 25; *County v. Newport*, 12 B. Mon. 538.)

We pass now to the consideration of the question as to whether the plaintiffs had notice of the claim of the public upon this land prior to their alleged purchase from Coffin and wife. The testimony shows that they knew that Coffin was the original proprietor of that portion of the city wherein the land in controversy lies. They knew also that he, together with the other proprietors, had laid out and established a town upon the "Portland land claim." They knew also that a town had been built upon said claim, which extended west beyond the public parks. They knew also that it had been built upon a plan indicated upon some other map than the one made by Coffin in December, 1867, and that no improvements had been made upon the "Park Blocks," as they are commonly called, throughout the entire length of the Coffin claim, while the blocks on both sides of the parks had been extensively improved. The testimony also shows that both plaintiffs were residents of the city prior to the date of the making of the map of "Coffin's Addition to the City of Portland." That Carter was a member of the City Council in 1866, when the ordinance authorizing the "Committee on Streets and Public Property" to contract for the improvement of the public parks was passed. That deeds from Coffin, conveying nearly all the lots and blocks lying in that part of the city, had been executed to different parties prior to December, 1867, and these deeds were of record in the proper office, and many of the lots and blocks were improved and occupied. That the map, according to which the conveyances were made, was the Brady map, copies of which were upon the walls of the public offices of the city and county, to which plaintiffs frequently resorted in transacting their business. That plaintiff Carter had been engaged in buying and selling real estate in said city, and had known this property for six

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or seven years; had owned property described by the Brady map; had in 1866 executed a deed to one Stinson to lot 4 in block 216 and lot 6 in block 238, according to the "maps and plats of the city of Portland," and that said lot 4 in block 216 faces the row of public parks, but is north of the line of Coffin's claim. That plaintiff Mason wrote the said deed to Stinson, and took the acknowledgment thereof in September, 1866. That Carter had heard of the park blocks and the Brady map before he purchased from Coffin in 1867. That both plaintiffs had engaged in conversations, in which the claim of the city to the property in controversy was alluded to, before they purchased. That plaintiff Mason, as notary public, took the acknowledgment of the Coffin map in December, 1867. That prior to said date he had seen the Burrage map, and had a copy of the McCormick or Directory map in his office, upon both of which the parcels of land in controversy were unnumbered and were designated as public parks, and were displayed as upon the Brady map. Finally, that the premises described were generally understood to be public property.

Passing from the facts, let us consider the law touching notice. It is a well-settled principle that to constitute notice, it is not necessary that it should be in the shape of a distinct and formal communication, and it will be implied where a party is shown to have had such means of informing himself as to justify the conclusion that he has availed himself of them. It has frequently been decided by the American as well as the English Courts, that whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, will operate as notice. (*Le Neve v. Le Neve*, 2 Leading Cases in Equity, 160; *Barnes v. McChristie*, 3 Penn. St. 67; and *Bohlman v. Carter*, decided at the last term of this Court.)

Indeed, we think that notice should, with rare exception, be implied where a party is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man. In *Rowan's Executors v. Portland*, hereinbefore cited, Marshall, C. J., in delivering the opinion

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of the Court, uses the following language in relation to notice, which is singularly applicable to the case under consideration: "The notoriety, actual as well as legal, of the acts involved in the making of a town, the laying out of the town upon the land, the representation of it upon a map open to public inspection, * * * the advertisement and sale of lots according to that plan, the conveyance of them by recorded deeds referring to the plan, the subsequent inclosure and improvement of some of them for business or residence, and, in fine, the actual existence of a town upon the land, must be considered as giving to the world such notice of the plan, to which all these acts and facts must have reference, as to preclude the possibility of afterwards acquiring from the original proprietor, or of asserting with a good conscience any right or interest inconsistent with those which, according to the plan of the town, are appurtenant to the lots, and are, therefore, granted to or held for the lot owners or citizens, and the local or general public." Applying these principles of law to the facts stated, we feel fully warranted in concluding that the plaintiffs had sufficient knowledge of the matters referred to, to charge them with full notice of the claim of the city of Portland to the parcels of land in controversy, prior to the date of their alleged purchase.

It was urged by plaintiffs' counsel that a dedication could not be predicated of the use of the Brady map by Coffin, for that the same was not of record. It is unnecessary to discuss this proposition at length, for it must be obvious, from the views already expressed, that to support a dedication of streets, alleys, public parks, etc., it is not necessary to show that the map upon which such streets, alleys, public parks, etc., were displayed, was recorded, but simply that it was used and referred to by the proprietor in selling the lots and blocks to which the streets, alleys, public parks, etc., are appurtenant.

The remaining questions are unimportant, and as the views already expressed are decisive of the case, they need not be discussed.

It follows that subsequent to the passage of the Donation

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Act, September 27, 1850, and prior to the date of the execution and recording of the map of "Coffin's Addition to the City of Portland," December 4, 1867, Coffin dedicated the land in controversy to the public use; that before the date of the deed from Coffin and wife to plaintiffs, December 28, 1867, the dedication had become irrevocable; that the plaintiffs purchased with full knowledge of the pre-existing rights of the public in and to said parcels of land, and therefore took only the naked fee and acquired no rights or equities which they can assert against the public use to which the premises were dedicated by their grantor.

The decree of the Court below must be reversed and the suit dismissed at plaintiffs' cost.

Decree reversed.

H. HOLCOMB, RESPONDENT, v. J. H. TEAL, APPELLANT.

FILING AFFIDAVITS OF SURETIES ON APPEAL.—The affidavit of the sureties in an undertaking on appeal as to their qualifications must be filed contemporaneously with the filing of the undertaking.

BILL OF EXCEPTIONS.—The bill of exceptions should be presented, allowed and signed at some time prior to the first day of the term next succeeding the term at which the cause was determined.

APPEAL from Polk County.

This was a motion to dismiss the appeal. The other facts are stated in the opinion of the Court.

R. P. Boise and P. C. Sullivan, for the motion.

J. J. Daly, contra.

By the Court, MCARTHUR, J.:

It is contended that the undertaking herein is insufficient, for the reason that there is no proper justification of the sureties, and that the affidavit does not show that the sureties are not of that class of persons who, by § 116 of the Civil Code, are prohibited from becoming sureties. There does not appear to have been any exception taken to the sufficiency of the sureties in the undertaking, consequently

4 352
6 413
8 208
9 179
13 209
13 210
16 223
9^a 484
9^a 485
17^a 873

4 352
a26 560
38^a 71

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there was no justification necessary. Counsel have fallen into an error in considering the affidavit of the qualifications of the sureties as the justification of the sureties. There is a wide distinction between them. The justification need only be made after exception to the sufficiency of the sureties, who must attend before some qualified officer and be examined under oath in relation to their sufficiency. (Civ. Code, § 117.) The affidavit of the sureties to their qualification as such must be filed contemporaneously with the filing of the undertaking. (Civ. Code, § 107, sub. 4.) It must set forth that each surety is a resident within the State, and that all taken together are worth double the sum specified in the undertaking over and above all debts and liabilities and property exempt from execution. It need not contain the negation that the sureties do not belong to the class prohibited by § 116, sub. 1, of the Code. The undertaking and affidavit are sufficient.

Passing to the second point raised by the motion, we discover from the record, that the judgment attempted to be appealed from was made and entered on November 21, 1872. The certificate of the clerk, annexed to the record, bears date May 1, 1873. The bill of exceptions was allowed and signed by the Judge of the Court below July 22, 1873. Consequently the bill of exceptions could not have been filed in the Court below, and could not have been a part of the judgment-roll, as required by § 269, sub. 2, of the Code, at the time of the making of the clerk's certificate. The section referred to requires the clerk, after docketing the judgment, and before the next regular term of Court, to prepare and file in his office the judgment-roll. We are of opinion that *all* the papers constituting the judgment-roll must be so prepared and filed. This Court will take judicial notice that a regular term of the Circuit Court was held in Polk County between the date of the entry of judgment herein and the signing of the bill of exceptions. As the law stands the Judge had no authority to sign the bill of exceptions. It should have been presented, allowed and signed at some time prior to the first day of the term next succeeding the term at which the cause was determined.

Statement of Facts.

We cannot regard this bill of exceptions, and as there are no errors complained of except those set forth therein, the motion to dismiss this appeal must be allowed.

Appeal dismissed.

JAMES F. BYBEE, APPELLANT, v. GEORGE SUMMERS
AND WM. ELLIS, RESPONDENTS.

INTERLOCUTORY ORDER.—In a suit for partition of real estate, the order or decree of the Court directing the partition or the sale of the premises without further proceedings, is not a final decree, but only an interlocutory order, and is not notice to parties and their privies, etc., under the provisions of § 15, p. 154 of the Statutes of 1855.

LIS PENDENS.—To bind innocent purchasers for a valuable consideration by the proceedings in the suit for partition, under the doctrine of *lis pendens*, the cause should be prosecuted with reasonable dispatch. A suspension of proceedings for more than five years would be an unreasonable delay.

APPEAL from Clatsop County.

On the 10th day of August, 1869, plaintiff (appellant) commenced this proceeding under the provisions of § 377 of the Civil Code, for the purpose of carrying into execution a decree of the District Court for Clatsop County, alleging in his complaint that on the 10th day of September, 1859, one Cyrus Olney commenced proceedings against this plaintiff and one James Taylor for the partition of lots one (1) and two (2) in block fifty-five (55) in the town of Astoria. That on the 13th day of October, 1859, upon the hearing of said cause, it was adjudged by the Court that said Olney was the owner of the undivided three-sixths of said property, this plaintiff of two-sixths, and said Taylor of the remaining one-sixth. And it further appearing to the Court that said lots, owing to the condition of the improvements thereon, could not be divided without prejudice to the owners, the Court decreed the sale of the same. Plaintiff further avers that said Olney afterwards purchased the one-sixth interest of said Taylor by deed bearing date April 4, 1862; and that said Olney conveyed to defendants (respondents herein) his entire interest in said premises by

deed bearing date June 28, 1865. Plaintiff concludes with a prayer for a decree of the Court below, renewing the order of sale of October 13, 1859, and enforcing the same between the parties to this suit, according to their respective rights, as set out in complaint.

Defendants admit the partition proceedings and order of sale of October 13, 1859, as set out in the complaint, but deny that plaintiff is the owner of said premises or any part thereof as against them, and claim that they are the owners of the whole thereof by deed from said Olney, who, they allege, acquired the same by deed from John McClure, the donee of the Government, under Act of Congress of September 27, 1850; and that the conveyances from the Government to McClure, and from McClure to Olney, were duly recorded. Defendants further aver that they purchased said premises from Olney in good faith, for a valuable consideration and without any knowledge of plaintiff's claim to any right, title or interest in the same. No reply was made by plaintiff, and this cause was submitted to the Court below on stipulation of the parties, each party claiming judgment on the pleadings. The Court below rendered a decree for the defendants, dismissing plaintiff's cause, from which he appeals to this Court.

Hill, Thayer & Williams, for Appellant.

Johnson & McCown, for Respondents.

By the Court, BONHAM, J.:

Two questions are presented by the pleadings and the arguments of counsel in this case for the consideration of the Court:

First. Was the order of the District Court for Clatsop County, made October 13, 1859, directing the sale of the premises described in the partition suit of Olney against Bybee & Taylor, a final decree in effect, or was it only an interlocutory order?

Second. If the order above referred to was only interlocutory, would the rights of the plaintiff Bybee, to the in-

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terest claimed by him in the premises, be protected by the doctrine of *lis pendens*?

It was urged by counsel for appellant, with a good deal of apparent force and reason by analogy, that the finding of the Court of October 13, 1859, determining the rights of appellant and the other parties to the partition suit, to their respective interests in the premises in question, and directing the sale of the same, was in effect a final determination of those questions, and that nothing remained to be done except to enforce that order or decree in the manner and by the means similar to those recognized and usually resorted to by Courts for that purpose. The judgment of the Court in this case, it is claimed, was equally as final and conclusive as the decree of a Court directing the foreclosure of a mortgage and the sale of the mortgaged premises.

But the character of the decision of the Court of October 13, 1859, determining the interests of the parties to the suit in the premises in controversy, and directing the sale of the same, is to be determined, not by the common law, but by the statute in force at the time on the subject of the partition of real estate.

Section 15, on page 154 of Statutes of 1855, reads: "The Court may confirm or set aside the report and, if necessary, appoint new referees. Upon the report being confirmed judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and conclusive—

"1. On all parties named therein and their legal representatives who have, at the time, any interest in the property divided, etc.

"2. On all persons interested in the property who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by § 5; and

"3. On all other persons claiming from such parties or persons or either of them."

It is claimed by counsel for appellant that "the decree of a Court of competent jurisdiction (Civ. Code, § 723) is not only binding upon the parties, but privies also, including

privies in estate, and the purchaser from one of the parties takes subject to the decree and cannot dispute its binding force.”

The principle above enunciated, as applicable to this case, is true if the decree be a *final* one. And it may also be true where the decree is not final, under the doctrine of *lis pendens*, if the suit or proceeding is prosecuted with reasonable diligence and dispatch. But we are clearly of the opinion that the section of the Code above referred to (§ 723) only has reference to a final judgment or decree or a final order.

The inquiry then arises, was the judgment of the District Court for Clatsop County, rendered October 13, 1859, directing the sale of the premises in question, a final judgment? We hold that it was not. The language of the statute of 1855 (§ 15, p. 154) is as follows: “Upon the report being confirmed judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and *conclusive* between the parties and their representatives and successors in interest, by title subsequent to the commencement of the action,” etc. This section of the statute declares by implication that until the report of the referees is confirmed by the Court, the proceedings theretofore had shall not, as a judgment, be binding and conclusive, but the decision of the Court is only an interlocutory order. (Freeman on Judgments, §§ 29, 30 and 31.)

Section 31, referred to, in defining an interlocutory decree, reads as follows: “A decree is interlocutory which makes no provisions for costs, and in which the right is reserved to the parties to set the cause down for further directions not inconsistent with the decree already made, and so is a decree which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee.”

The effect of a judgment or decree in partition, is to be determined by the statute and not by the common law. (*Morenhout v. Higuera*, 32 Cal. 289; *Kester v. Stark et al.*, 19 Ill. 328.)

In the case of *Kester v. Stark et al.*, above referred to,

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Spencer Stark, who was not made a party to the partition suit, came in after partition had been decreed by the Court, and commissioners to divide the land had made their report, and filed his answer to the petition, by way of interpleader setting up an interest held by him in the premises sought to be partitioned; and the Court, in speaking of his right to do so, says: "The statute says the interpleader may be filed during the pendency of such suit or proceeding." Any time before the case is finally disposed of, must be considered as during its pendency. Until that time it is before the Court, and entirely subject to its control and jurisdiction, and any previous orders or proceedings may be changed, altered or amended to meet the exigencies of new facts which may be brought before the Court by new parties, by their interpleaders. Here everything was *in fieri* when this interpleader was filed. The suit or proceeding was not yet finally determined, but was still pending, and the interpleader was filed in proper time.

Another test of the finality and conclusiveness of the proceeding of the Court of October 13, 1859, is, whether an appeal might have been taken from the same. We are clearly of the opinion that it could not, and that the order or decision of the Court, directing the sale of the premises, etc., as set out in plaintiff's complaint, does not place the subject-matter of the proceeding *res judicata* as between the parties, or innocent purchasers from them, or either of them.

And, as a further reason in support of the correctness of this proposition, it should be borne in mind that the correct and established practice of our Courts, under the Code, as it was also under the statutes of 1855 referred to, in proceedings for partitions, after the order of partition or sale (as the case may be) is made by the Court, and the referees are appointed to divide or sell the premises in question, to continue the cause for the report of such referees, and for the final determination of the proceeding. On the coming in of the report the same may be confirmed, rejected or modified; and, prior to the confirmation of the report, no question of costs can properly be determined, and no judg-

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ment-roll is required to be made up by the clerk under the directions of the statute, and no entry of the cause is required to be made by him in the judgment-lien docket, all of which are tests of the finality of the proceeding.

To hold that the order of the Court below, of October 13, 1859, was in effect a final judgment, and not only binding and conclusive upon the parties to the partition proceeding, under § 15 of the statutes of 1855, but also on all other persons claiming from such parties, or either of them, would be to greatly jeopardize the rights of innocent purchasers of real estate.

It appears from the pleadings in this case that the defendants, on the 28th day of June, 1865, and more than five years after the order of sale of October 13, 1859, was made, purchased from Cyrus Olney the whole of the premises in controversy. And the defendants allege (and it is not denied) that they purchased the same in good faith and for a valuable consideration, and without any notice of appellant's interest therein; and that said Olney then had a clear record title to the premises.

It is true that, *as a rule*, a grantor can convey no higher estate in lands than he has himself. But for the protection of innocent purchasers a system of registration is provided by law, the failure to comply with which may result in the forfeiture or loss of one's estate. It is highly important to the security of titles to real estate that they should be spread out and made patent to the whole world in some kind of legal record. By the established law and practice of registration what was required of these respondents, as prudent and cautious men, when they purchased the lots in controversy in June, 1865? In the first place they ascertained that their grantor, Olney, had a clear record title by deed duly recorded from McClure, and that McClure held a patent from the Government of the United States to the lots in question. The next inquiry which would suggest itself would be to further examine the records of deeds to ascertain if the land in question had been alienated by deed of prior date to another. Then the record-books of mortgages would also be resorted to to ascertain if there were any in-

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cumbrances on the land. Next, the judgment-lien docket would be referred to, to determine if there were any incumbrances by judgment, or any adjudications to which the respondent's grantors were parties, which would operate as an alienation or estoppel by record. The investigations thus far are all aided by records, which the law requires to be alphabetically indexed for ready reference. No judgment-roll having been made up, and no entry in the judgment-lien docket having been made of the order of October 13, 1859, declaring the several interests of the parties to the partition proceeding, nothing would be elicited from this quarter to indicate that appellant claimed any interest in the lots in question.

The next and last inquiry on the part of respondents then would be to see if under the doctrine of *lis pendens* their grantor's title was in any way affected. To obtain the desired information, they would inquire of the Clerk of the Court concerning causes pending in the Courts of record of Clatsop County, and examine the dockets of causes pending and the pleadings on file therein.

This brings us to the consideration of the second question involved in this case. Was the sale and conveyance by Olney of June 28, 1865, to respondents, made *pendente lite*; or, in other words, was the interest of Bybee in these lots protected by the doctrine of *lis pendens*? As hereinbefore stated, this inquiry involves no difficulty in its solution. The constructive notice which the law presumes by *lis pendens* is less reliable, we think, than any of the other kinds of constructive notice arising from registration; and in order that a party may be thus protected, the suit should be prosecuted with reasonable diligence and dispatch. (Freeman on Judgments, § 202; Adams' Equity, 5th American edition, 323, note 1, and cases there cited; *Diamond v. Lawrence County*, 37 Pa. 353; *Erhman v. Kendrick*, 1 Met. Ky. 146; *Ferrier v. Buzick*, 6 Clarke's Iowa, 258; 2 Leading Cases in Equity, 171, 175.)

In this case the parties to the partition proceeding not only failed to use reasonable diligence in the prosecution of their suit, but were guilty of gross laches; it appearing,

from the pleadings, that no further step was taken after securing the interlocutory order of sale of October 13, 1859, until August 10, 1869, when the appellant was compelled, in order to consummate his remedy, to come in under § 377 of the Code, and ask for the revival of the proceeding by an original suit. To give effect to a *lis pendens* the suit should be prosecuted with such diligence as to give the proceeding some kind of notoriety. After so long a lapse of time little opportunity would be afforded a purchaser to ascertain the condition of a title which he might be looking up, so far as it might be affected by the pendency of legal proceedings; for the reason that papers are liable to be mislaid, and the cause omitted from the docket, and a new clerk might, in the meantime, come in, who would have no personal knowledge of the former proceedings, and the purchaser, under such circumstances, would be very liable to fail to get information of the pendency of the cause.

We think that a fair regard for the rights of an innocent purchaser, under such circumstances, demands that he should not suffer.

Decree affirmed.

[NOTE.—This cause was first submitted at the September term, 1871, and a majority of the Court, on the hearing at that time, were of opinion that the decree of the Court below should be reversed. An application was afterward made, under the rule, for a rehearing of the cause, for the reason that, owing to the unavoidable absence of the principal counsel for respondents, the case was not fully presented on their behalf. At the July term, 1873, of this Court, a rehearing was granted, and, after a thorough reargument and mature deliberation, the decree of the Court below was affirmed, all the Justices concurring.]

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W. W. CHAPMAN, APPELLANT, v. JAMES H. WILBUR,
RESPONDENT.

PROPERTY IN TRUST—GRANTOR'S INTEREST IN.—A grantor of property in trust for a specific purpose retains such an interest therein as entitles him in equity to insist on a specific execution of the trust; but a diversion of trust property by a trustee from the purpose for which it was granted, does not operate as a forfeiture of the property or cause it to revert to the donor.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

J. H. Reed, for Appellant.

Gibbs & Upton and Caples & Moreland, for Respondent.

By the Court, PRIM, J.:

This was a suit in equity to have certain deeds relating to block 224 in the city of Portland set aside and held for naught, and the title to said block decreed to be in complainant.

The material facts are as follows: On September 7, 1850, Stephen Coffin, D. H. Lownsdale and W. W. Chapman, being in possession, conveyed two adjacent blocks of land known as blocks 205 and 224 in the city of Portland "to James H. Wilbur, trustee, for the use and benefit of the Methodist Episcopal Church of Oregon * * * for the purpose of erecting an academy thereon, and therewith * * * to be by him conveyed to such person as shall be appointed to receive and hold the title for the use and benefit of the Methodist Episcopal Church of Oregon." This deed contained a covenant that if they, the grantors, should obtain title to said property from the United States, they would convey the same as aforesaid by deed of general warranty; and also that they would warrant and defend the said property against the claims of all persons claiming by, through or under them. Soon after receiving this deed, Wilbur went into the possession of the premises, and, in

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concert with the said Church, erected a building on block 205, and instituted an academy upon it.

About the 1st of September, 1853, plaintiff obtained the legal title to the premises from the United States, and on the 10th day of that month he and his wife executed a deed of the premises to J. H. Wilbur, Trustee of the Oregon Annual Conference of the Methodist Episcopal Church in Oregon. This deed professes to recite the purport of the former deed and to be confirmatory of it, but departs from its tenor in several particulars. It is dated the "25th day of June 1851," and refers to the grantors as having, by deed of quit-claim, conveyed to the said James H. Wilbur, trustee as aforesaid, the property hereinafter described for the purpose of establishing thereon a seminary of learning to be divided into a male and female academy.

In 1854 a corporation was formed by an Act of the Territorial Legislature called "the Board of Trustees of the Portland Academy and Female Seminary." After this corporation was organized it was selected, by the said church, as its agent to hold the title of the property and manage the affairs of the academy. Wilbur, however, it appears, continued to act as such agent and trustee up to about 1853, and, in the construction of the academy, had advanced of his own funds some five thousand dollars. Afterwards, Wilbur conveyed the two blocks to the said Board of Trustees of the Portland Academy and Female Seminary.

The Board having audited the accounts of Wilbur, and having found a large amount due him on account of advances made by him in constructing the academy, bargained with him to take block 224 in satisfaction of that claim, and, on June 9, 1860, executed to him a conveyance of said block, since which time he has been in the possession of it, claiming it as his own.

It is claimed by plaintiff that this was a diversion of block 224 from the purpose and use for which it was intended, and a violation of the trust, by which the property is forfeited and reverts to the donor.

One of the theories assumed by counsel for plaintiff is, that the grant was upon a condition subsequent to be per-

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formed by the grantee; and, that the condition of the grant, not having been performed by establishing a seminary of learning on each block, that therefore block 224 is forfeited, and reverts to the grantor. To sustain this position, counsel for plaintiff cite the case of *Heydon et al. v. The Inhabitants of Stoughton* (5 Pick. 528). That was a devise of a certain piece of land for a certain purpose, upon a certain condition specified in the devise. The words of the devise were as follows: "I give to the town of Stoughton a certain piece of land (describing it), for the purpose of building a school-house for the use of a free grammar school (or for such other school as said town may direct); *provided*, said school-house is built by said town within one hundred rods of the place where the meeting-house now stands." That was held, by the Court, "to be a devise upon a condition subsequent; that the estate accordingly vested in the devisees, and was forfeited by a neglect for twenty years to comply with the condition."

It will be noticed that that case is not at all analogous to the one under consideration. The grant here was an absolute grant to the defendant in trust for a certain purpose specified, while there the land was devised to the town for a certain purpose, coupled with a certain condition to be performed by the town.

Warren v. The Mayor of Lyons City (22 Iowa, 351) is another case relied upon by counsel for appellant. In that case the owners in fee of the land, where the city of Lyons is laid out, dedicated a certain piece of land to the town for a public square, to be held by said town in trust for public use as such square, and for no other purpose. The lots adjoining it were valuable, and some of them had been improved with a view to its always being kept open to the public for such use. Plaintiff had lots adjoining the same, of great value, but which would be of but little value if cut off from said public square. The municipal authorities procured said "public square" to be subdivided into small lots with a view of leasing them to private individuals, for a term of years, to be built upon and used by them to the exclusion of the public, thereby

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diverting it from the purpose and use for which it was originally dedicated. This, it was held by the Court, was an attempt to divert the land from the use and purpose intended by the original proprietors, and therefore void. The Court said:

“For the uses contemplated the proprietors may have parted with the fee—the proprietary right—but not for all purposes, and therefore if the city authorities, as trustee of the public, should undertake to make gain by the sale, or to authorize its use for anything else than a public square, they violate the trust, and the original owners, in virtue of the terms of the grant, *may demand* that the trust shall be *executed* in good faith, and restrain any such proposed violation of the terms upon which the grant was accepted. Nothing can be clearer than, if a grant is made for a specified, limited and defined purpose, the subject of the grant cannot be used for another purpose, and that the grantor retains still such an interest therein as entitles him in a Court of equity to insist upon the execution of the trust as originally declared and accepted.”

The same doctrine is well expressed in *Barclay v. Howell's Lessee* (6 Peters, 507). The Court said: “If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a Court of Chancery to compel a *specific execution of the trust* by restraining the corporation. * * * But even in such a case, the property dedicated would *not revert to the original owner*. The use would still remain in the public, limited only by the conditions imposed in the grant.” (1 Ohio St. 478; 8 Ohio, 552.)

Thus, while all the authorities appear to hold that a grantor of property in trust for a specific purpose retains such an interest therein as entitles him in equity to insist upon the execution of the trust, not one has been cited, and we can find none holding that a diversion of the property, by the trustee, operates as a forfeiture of the property, and causes it to revert to the donor.

It is claimed by defendant that the proper construction

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of the deeds in question is, that one block might be sold or mortgaged for the purpose of raising money to build an academy upon the other; while it is insisted by plaintiff that they should be construed to mean that an academy should be built upon each block. In order to dispose of this case, under the view taken by the Court, it is immaterial which of these constructions is adopted as the correct one, and, therefore, we have not undertaken to pass upon that question.

If the construction contended for by defendant is the correct one, then there was no diversion of block 224 from the purpose or use for which it was granted; while, if the construction contended for by plaintiff is the correct one, then, although there was a diversion of said block by said trustees, it was immaterial, since such diversion does not operate as a forfeiture of the trust property by the *cestui que trust*, or cause a reversion of it to the grantor.

It follows, from the views herein expressed, that the decree, dismissing the bill with costs, must be affirmed.

DECEMBER TERM, 1873.



REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT,
DECEMBER TERM, 1873.

J. I. THOMPSON, APPELLANT, *v.* A. UGLOW,
RESPONDENT.

EASEMENT—RIGHT OF ENTRY FOR REPAIRS.—One who has a right to the enjoyment of an easement has a right to enter for the purpose of repairs, as against the owner of the servient estate, whenever the easement cannot be otherwise enjoyed; and he has the right to dig up and use the adjacent soil for the purpose of repairs whenever there is no other mode.

INSTRUCTIONS—ERROR DOES NOT AFFIRMATIVELY APPEAR, WHEN.—Where the record does not disclose whether or not the mode of making repairs depends on the construction of a written instrument, error does not affirmatively appear from a statement in the record that the Court instructed the jury that the defendant was not obliged to bring soil from elsewhere to repair a ditch conveying water over the plaintiff's land.

APPEAL from Polk County.

This is an action for damages alleged to have been caused by the improper use and management of a water-race, leading through the plaintiff's land to the defendant's flouring-mill.

The complaint states that the plaintiff is owner and entitled to the possession of a certain parcel of land, and that the defendant is owner of and in possession of the right of way

Statement of Facts.

to a narrow strip of land through said premises to be used as a mill-race, to run the flouring-mill of the defendant, and charges that the defendant wrongfully failed and neglected to keep his race in good repair, to clean it out and to keep up the banks, and thereby caused the waters of the race to overflow and damage the plaintiff's land. The complaint also contains a count for damages, caused by the defendant's entering upon the lands of the plaintiff adjacent to the defendant's water-race and digging up and removing the turf and soil in repairing the race, the aggregate amount of damages claimed being \$1700.

The answer puts in issue all that is charged respecting the acts and negligence of the defendant. The cause was tried by a jury, and a verdict having been rendered in favor of the defendant, the plaintiff appeals to this Court and states the following as the grounds of his appeal :

1. The record does not show that the jury was present in Court during the trial on the 24th day of May, 1873.

2. The Court refused to charge "that the defendant had no right to dig the turf, soil and meadows of the plaintiff to the distance of ten or fifteen feet from the race and convey away and use the same in repairing the said race."

3. The Court, after refusing the instruction aforesaid, charged the jury on the same point as follows: "It is not the province of the Court to decide that question as a question of law, but it is for the jury to determine it from the circumstances of the case. The defendant would not be obliged to take soil from his race or bring material from elsewhere to repair a breach in his race, but might take the necessary material for making such repairs from the premises of the plaintiff near the race, doing no unnecessary damage thereby, and going no further from the line of the ditch than is absolutely necessary, and the jury may determine from the circumstances to what distance he may go from the race for such material."

4. The Court refused to charge "that the defendant had no right to use said right of way or race for floating wood or logs, but only for the purpose of carrying water to his flouring-mill."

Opinion of the Court—Upton, C. J.

J. L. Collins and N. B. Humphrey, for Appellant.

Boise & Willis, for Respondent.

By the Court, UPTON, C. J.:

The question principally controverted on the argument is, whether one who is entitled to construct a ditch or water-race and convey water over the lands of another, has the incidental right to use the soil adjacent to the race in making repairs. The brief of the appellant refers to numerous cases touching the obligation to repair and the right to enter for that purpose as between the owners of the dominant and servient estates, but the authorities cited do not directly decide the question here presented. No one of them furnishes a general rule by which to determine the right to use the soil adjacent to the artificial watercourse for the purpose of repairs in cases where the same repairs can be made by other but more expensive means.

It is very clear from the authorities cited, and it is an elementary doctrine, that one who has the right to use has incidentally the right to repair; and it follows that if repairs cannot be made without doing acts that would otherwise be an unlawful encroachment on the lands of the owner of the servient estate, the necessity of making repairs and the right to make them includes the right to occupy and use whatever is indispensable for that purpose; but none of the authorities cited give us a rule for determining, in the absence of express agreement of the parties, whether one who has an easement in the land of another to convey a stream of water over it in a race may dig up the soil near the race for the purpose of repairing the banks, in case the repairs can be made by bringing soil from elsewhere. The appellant lays much stress on the statement made in *Washburn on Easements*, §§ 196, 254, and in many cases cited in his brief, to the effect that the rocks and the earth extracted in constructing a canal belong to the owner of the soil. He fails to recognize the fact that the soil of which the canal itself is constructed belongs to the owner of the servient estate, and that he who has the dominant estate and the right to repair

and to use a water-race to convey water is entitled only *pro hoc*. One who has such easement in the lands of another has not the ultimate property that will authorize him to carry away the soil or use it for any purpose not connected with the use of the water; hence, the fact that the rocks and the earth excavated are the property of the owner of the soil does not settle the question whether the owner of the dominant estate may take them for the purpose of making repairs.

The right to convey water through or over the lands of another, unless it is a mere license revokable at the will of the owner of the soil, rests in grant; and the terms of the grant, when they can be definitely ascertained, control its extent. The grant may be evidenced by deed, or it may be presumed from long enjoyment. In the one case the terms of the deed, and in the other the mode of enjoyment, must be known to enable a Court to determine who is bound to repair, or to what extent a party is privileged or restricted in the mode of making repairs.

The general rule, that a party who has a right of enjoyment, has also a right to enter and make necessary repairs, is essential to the enjoyment of the thing granted. This right necessarily passes by the grant, otherwise it would be in the power of the grantor to virtually nullify and defeat his own deed, by depriving the grantee of the power to repair and use the thing granted. If the mode of enjoyment, and of making repairs, is specified in the grant, the Court was only to construe the contract; or, if the right has been acquired by prescription, the Court will ascertain, under the ordinary rules of evidence, how the right has been exercised and enjoyed; but cases arise where an easement has been acquired by deed, and the instrument is silent both as to the party bound to make repairs and as to the privileges and duties of the party in making them.

It has been stated, in general terms, that where the deed thus leaves the matter of repairs to be implied, each case must be determined according to its own peculiar circumstances. The authorities cited establish the following general principles: The owner of the servient estate is not obliged to make repairs unless by virtue of a covenant so to

do, express or implied. The owner of the easement is privileged to repair in all cases where the easement cannot be enjoyed without repairs; and in making them, he may dig up the soil and otherwise use and encumber it, doing no more injury than is necessary when such course is indispensable to the enjoyment of the easement.

When a particular mode of repair is convenient, but not indispensably necessary, no general rule is laid down in the authorities cited.

In the case before us the terms of the deed are not set out, and it does not appear by the pleadings whether or not the rights of the parties in making repairs, are defined by the deed or contract under which the easement is claimed. On this point the complaint alleges that the plaintiff is owner, and in possession of, certain premises, and the defendant "is owner, and in possession of, a right of way to a narrow strip of land through said premises, to be used as a mill-race to run the flouring-mill of the defendant." No objection was taken to the form of the pleading, and the Court construes this to be a statement that the defendant had an easement in the plaintiff's land, to convey a stream of water over it in a race to the plaintiff's mill.

The contract by which the easement was created not being before us, and this Court having no information as to its terms, touching the subject of repairs, cannot decide as a matter of law whether the defendant had a right to dig up the soil; neither can it be ascertained from the facts alleged or the evidence disclosed by the transcript, whether these repairs could have been made without digging up the soil.

The Court instructed the jury that the defendant would not be obliged to take soil from his race or bring material from elsewhere to repair a breach in the race. Under certain conditions of the pleadings and evidence, the point involved in this instruction would include a question of fact which should be submitted to the jury, but if the right depended on the construction of a deed or other writing, it was a matter to be passed upon by the Court. As it does not appear by the record whether the contract under which the easement was acquired was in evidence, we cannot say

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that the instruction was improper. The Court properly refused to instruct that the defendant had no right to dig the turf to the distance of ten or fifteen feet from the race. If there was a material question as to whether ten or fifteen feet was a reasonable distance, it was a question for the jury.

The plaintiff requested the Court to instruct "that the defendant had no right to use the ditch for floating wood and logs." This the Court refused to give, and charged that "if by reason of floating wood or logs the race became stopped up and thereby was caused to overflow and damage the plaintiff the defendant would be responsible for damages."

It is not shown, by the transcript, whether or not the defendant had the right to float wood and logs in the ditch, and no issue is made by the plaintiff on this point. Evidence that the ditch was used for that purpose appears to have been admissible, as tending to show that the overflow was caused by a negligent or improper mode of using the ditch, but unless the overflow resulted from that use the question whether the defendant was entitled to so use the ditch was an abstract proposition, not material to the decision of the cause, and upon which it was not the duty of the Court to instruct. Using the ditch for that purpose was not made a ground for general or special damages, and it would have tended to mislead the jury to give an instruction from which it might be inferred that the defendant was entitled to even nominal damages for that cause alone.

There is nothing in the point first stated "that the record does not show that the jury was present during the trial on the 24th of May." The record shows that the jury was regularly impaneled and sworn on the 23d of May; that the trial continued to the 24th, and that on the latter day the verdict was returned in Court. Every presumption is in favor of regularity after jurisdiction is acquired.

The judgment should be affirmed.

Opinion of the Court—Bonham, J.

**JAMES H. EVANS, RESPONDENT, v. S. H. CHRISTIAN,
APPELLANT.**

WRIT OF REVIEW.—Writ of review will not lie where the right of appeal exists.

DECISION OVERRULED.—*Schirott & Groner v. Phillippi & Coleman* (3 Ogn. 484), overruled so far as it is there held that appeal and review are concurrent remedies. Same case approved so far as it holds that review will lie in a cause (otherwise proper) where the time for appealing has elapsed.

JURISDICTION.—When want of jurisdiction appears, it is the duty of the Court at any stage of the proceeding, on its own motion, to refuse to proceed further.

APPEAL from Lane County.

Christian, the appellant, sued Evans, the respondent, before a Justice of the Peace in and for Lane County, to recover the value of a horse; and after issue joined and trial had, obtained judgment against Evans for one hundred and sixteen dollars and costs, which judgment was docketed on the 6th day of September, 1873.

On the 20th day of September, 1873, Evans sued out a writ of review in the Circuit Court for Lane County, assigning error upon the record occurring at the trial of said cause before said Justice of the Peace. Upon the trial in the Circuit Court on said writ of review, it was adjudged that there was error in the proceedings of the Justice of the Peace at the trial, as alleged in plaintiff's petition, and the judgment rendered by said Justice was reversed. From this judgment of the Circuit Court the defendant Christian appeals to this Court, assigning as error the following points: Error in holding the order of the Justice, for a jury, illegal and void; error in holding that the defendant had not waived the defect, if there was defect, by going to trial with the jury selected; error in annulling and declaring void the judgment of the Justice and in taxing the costs against the defendant.

By the Court, BONHAM, J.:

For the purposes of this case we only deem it necessary to consider the third ground of error assigned; and we

4	375
5	275
8	498
13	417
14	208
14	300
14	310
14	311
11*	50
12*	440
12*	441
4	375
33	208
4	375
40	77
4	375
41	330
4	375
47	619

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only consider that so far as it involves the question of the jurisdiction of the Court below to grant a writ of review in a case like this, where the right of appeal existed *at the time* the writ was granted.

An appeal from the Justice's judgment in this case might have been taken to the Circuit Court within thirty days from the date of its rendition. The judgment was rendered on the 6th day of September, 1873, and the writ of review was sued out on the 20th day of the same month. This state of facts presents for our consideration the question whether the remedies by appeal and by writ of review are concurrent, and if not, whether the Court below had any jurisdiction or authority to grant the writ of review at a time when the right of appeal existed. This question was not argued here, and we understand that it was not in the Court below; but inasmuch as it is a question touching the jurisdiction of the Court, it is proper to consider it here, for if the Court below had no jurisdiction to proceed, this Court, which possesses only appellate jurisdiction, could acquire none by the appeal. And when a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the Court has no jurisdiction, either over the parties or the subject-matter of the cause, it is the duty of the Court on its own motion to refuse to proceed further. Any attempt to exercise judicial functions otherwise than as authorized by law would be a nullity and an idle waste of time.

There is, however, a *dictum* in *Schirott & Groner v. Philippi & Coleman* (3 Ogn. 484), which is well calculated to mislead the profession on the question of jurisdiction involved in this case. In fact, it is directly announced in that case by Mr. Justice Wilson, who prepared the opinion of the Court, that the remedies by appeal and writ of review are concurrent.

But this conclusion, as thus unqualifiedly announced, I think, may properly be regarded as mere *dictum*, inasmuch as the direct question presented by the facts in that case was, whether the writ of review would lie after the right of appeal, which once existed in the case, had been lost by lapse of time.

In the case at bar, the record shows that the time for appealing had not elapsed, and that respondent, when he sued out his writ of review, might have appealed.

The language of the statute is (Civ. Code, § 575): "The writ shall be allowed in all cases where there is no appeal or other plain, speedy and adequate remedy." What is the "other plain, speedy and adequate remedy" referred to in the Code, may often be a question more or less difficult of solution; but that appeal is *the* remedy, and the *only* remedy for the correction of errors of both law and fact so long as the right of appeal exists, we think is a conclusion clearly deducible from the language of the Code.

When the statute declares that the writ of review shall be allowed in all cases where there is *no* appeal, it is equivalent to saying that it shall not be allowed in any case where there *is* a right of appeal. And that an appeal is regarded as a plain, speedy and adequate remedy for the correction of errors of law, we think is clearly implied from the connection of the language—"where there is no appeal or *other* plain, speedy and adequate remedy." The use of the word *other* in the connection above quoted clearly designates and determines that appeal is the proper remedy where the right *exists*, and excludes the idea of the existence of any other remedy in such case.

We do not question the correctness of the decision of the Court in *Schirott & Groner v. Phillippi & Coleman*, so far as it determined the real question in that case. That was that a writ of review might issue in a case (otherwise proper) where the right to an appeal once existed, but which had been lost by the lapse of time. (*Milliken v. Huber*, 21 Cal. 166; *The People ex rel. Sturgis v. Shepard*, 28 Cal. 115.)

We are satisfied that the language of our statute on the subject of the writ of review does not warrant the construction that appeal and review are concurrent remedies. The Court below had no authority to grant the writ of review at the time it was ordered, and its judgment must therefore be reversed.

Argument for Appellant.

FENDEL SUTHERLIN, RESPONDENT, v. JANE
ROBERTS, APPELLANT.

STATUTE OF LIMITATIONS.—The defendant and her co-obligor executed a mortgage to secure payment of their joint note, and suit was commenced to foreclose the mortgage more than ten years after the note fell due; within the ten years part payment had been made on the note by the administrator of the defendant's co-obligor: *Held*, that the suit was not barred by the Statute of Limitations.

IDEM.—By § 25 of the Civil Code, the fact of part payment is made the test for ascertaining whether the action or suit is barred by the Statute of Limitations, and if it is not barred, the action may be founded on the original promise.

IDEM.—WHO MAY MAKE PAYMENT TO TAKE CASE OUT OF STATUTE.—Where part payment is made upon an existing contract of the kind specified in § 25, the creditor retains the right to sue on the original contract, without regard to the theory of a new promise, during the period prescribed, counting from the time of payment, and any person who could be compelled to pay is competent to make the payment.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

W. R. Willis, and Watson & Lane, for Appellant.

A payment by an administrator does not take the debt out of the statute as against a surviving debtor.

It is not a voluntary payment. There is no privity between the co-contractor and the administrator of a deceased joint contractor. (Civ. Code, §§ 1110, 1113, 1118, 1129, 1131, 1140 and 1141; *Partlow v. Singer*, 2 Ogn. 307; Civ. Code, § 4; 3 Bl. Com. 306, 307, and note; *Smith v. Irvin*, 37 Mo. 169, 174, 175; *Whitcomb v. Whiting*, 1 Smith's Leading Cases, 941, 942; 9 Pick. 42; 37 Mo. 104; Angell on Limitations, §§ 251, 252, 253, 240, and note 1; Id. 276, 287; *Root v. Bradley*, 1 Kansas, 437, 443-4; Md. Dig. 324, § 2 on Payments.

The rights of a party shall not be prejudiced by the declaration act or omission of another, except by virtue of a particular relation between them. (Civ. Code, § 674.)

W. W. Thayer and John Burnett, for Respondent.

The payment made by the administrator, May 18, 1864, suspended the operation of the Statute of Limitations from the time the claim matured until that of such payment. (Civ. Code, § 25; 9 Minn. 13; 2 Ogn. 307; 13 Pick. 206; Ang. on Limitations, § 206.)

It will be seen, upon examination of the section of the statute referred to, that it is *sui generis*, a provision peculiar to the limitation laws of Minnesota alone, except that it has been adopted by this State.

By the Court, UPTON, C. J.:

This appeal involves a construction of the Statute of Limitations. The suit was brought to foreclose a mortgage executed to secure payment of a joint note for \$2160.40 and interest, made by the defendant and Jesse Roberts, now deceased. It appears on the face of the complaint that the note, by its terms, became due February 1, 1862, and the suit was not commenced until 1873, more than ten years after the cause of suit accrued. But it is alleged in the complaint that on the 18th day of May, 1864, the administrator of the estate of Jesse Roberts, in due course of administration, paid the sum of \$960.16 in part satisfaction of the note, leaving unpaid principal and interest to the amount of \$3068.64. It also appears by the complaint that the money so paid was proceeds of the real estate of the decedent, under a sale made by order of the Probate Court. The defendant demurred to the complaint, on the ground that the facts stated do not constitute a cause of suit, and the demurrer was overruled. From that ruling the defendant appeals, and presents the question whether the payment made by the administrator of the defendant's co-obligor, brings the case within § 25 of the Code.

The appellant takes the position that a payment by an administrator is not a voluntary payment, that there is no privity between the co-contractor of the decedent and the administrator, and that such payment does not take the

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case out of the statute, as against a surviving debtor. He cites many cases in which a distinction is made between the acts of an administrator or executor and the acts of the joint contractor himself, and where it is held that there is no such relation between the former and the co-obligor of the decedent, as will authorize the former to affect the remedy as against the latter, or in other words, no such relation as will empower the administrator or executor to make a promise which will bind the co-obligor of the decedent. If these authorities are applicable in construing § 25 of the Code, it must be conceded that they go far in support of the appellant's position; but it will be observed that the statutes under which these cases arose were essentially different from ours. Section 25 of the Code is as follows:

“Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.”

In tracing the legislation on this subject, from the Act of 21 James I, ch. 16, down to the time of the latest authority cited by the appellant, we find no enactment expressed in language similar to the section now under consideration; and a review of the adjudged cases leads to the conclusion that the leading intent and object of this enactment is to divest the subject of numerous exceptions and an intricate maze of subtle distinctions resulting in the course of time from judicial opposition to the letter of the earlier enactments, and to sweep away the complication of doubtful and disputed questions with which the subject has been encumbered. It will therefore be unnecessary to refer to the numerous authorities cited, except so far as they may bear upon the question whether such is the intent and object of our statute. The most prominent feature of what is new in our statute is, that, by § 25, part payment prevents the time of limitation from commencing to run; whereas, under previous statutes and adjudications, the time of limitation

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actually ran against the debt, and part payment was held to be evidence of a new promise, which, being supported by the original consideration, became the basis of a new cause of action.

In 1st Smith's Leading Cases, 703, where the authorities on this subject are collated and so ably reviewed, it is said that the decision in the leading case—*Whitcomb v. Whiting*—was based on the idea "that if the presumption of payment arising from the lapse of time was rebutted by the acknowledgment or confession of the defendant, the end which the Legislature had in view was sufficiently attained"—an idea which the reviewer declares "inconsistent with the letter and spirit of the statute." The theory that the statute operated as a bar, by raising a presumption of payment, was prevalent at that time; but that idea is not expressed in the opinion as reported in the case of *Whitcomb v. Whiting*. According to the report the decision was placed on grounds quite independent of that doctrine. Lord Mansfield said in that case: "Payment by one is payment by all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises a promise to pay when the debt is admitted to be due." If his Lordship had added that, part payment is an admission of the residue of the debt, he would have made a concise but full statement of the theory upon which the whole discussion of the effect of part payment has proceeded in the cases cited by counsel.

In all these cases a payment which takes the case out of the statute, and the express promise which has that effect, have been placed side by side, and they have each been treated as the basis or proof of a new promise founded on the original consideration. So universally are these decisions based on the theory of a new promise, express or implied, that not a single case, meeting approval in modern times, is put on any other ground.

After judicial decisions had gone so far in admitting or creating exceptions that the rulings of the Courts were sometimes called judicial legislation, the extent of these exceptions was greatly narrowed by direct legislation from

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time to time. Section 24 of our Act is but a copy of statutes that have long been in force elsewhere; its effect being that a direct promise is not sufficient to take the case out of the general rule of limitation, unless the promise is contained in a writing signed by the party to be charged; but the enactment does “not alter the effect of any payment of principal or interest.” The effect of such payment was, therefore, until the enactment of § 25, still left a subject of judicial decision, and the Courts continued to hold that payment of part of the debt, unaccompanied by circumstances qualifying its effect, was an admission that the debt is owing, and that the law raises the promise to pay when the debt is admitted to be due. Much of the vast research and learning exhibited in the cases cited by counsel, has been devoted to determining under what circumstances part payment should not be considered a sufficient admission of the indebtedness to raise a presumption of a new promise.

It needs but a cursory examination of the cases relating to the effect of part payment under former statutes, to perceive that most embarrassing complications encumbered the subject when our statute was being enacted; a condition of the law which would naturally create a desire to substitute more simple rules for determining the liabilities of parties. By referring to the review of *Whitcomb v. Whiting*, above cited, it will be seen that the subject had not only become extremely complicated, but that there were numerous points still involved in doubt.

Among the controverted points upon which eminent counsel have differed, and upon many of which even the adjudged cases are in conflict, the following may be mentioned:—Whether there is such privity between co-obligors that payment, or a new promise, express or implied, made by one should affect the remedy as against the other: *Exeter Bank v. Sullivan*, 6 N. H. 124; *Fry v. Barker*, 4 Pick. 252; *Coleman v. Forbs*, 10 Har. 156. Whether one of the co-obligors being surety is material: *Perham v. Reynolds*, 2 Bing. 306. Whether payment by an indorser will bind other parties: *Beb v. Peyton*, 11 Sme. and M. 275; *Dean v.*

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Monroe, 32 Geo. 28. Whether it is material that the statute had already run when the payment was made: *Channell v. Ditchburn*, 5 Mason and Welsby; *Yong v. Monpoe*y, 2 Bailey, 278; *Ayers v. Richards*, 12 Ill. 126; *Emmet v. Overton*, 2 B. Mon. 643. Whether the executor or administrator holds such relation that the co-obligor of the decedent should be bound by a new promise of the executor or administrator, or that a new promise should be implied from a payment made by such agency: *Hathaway v. Haskell*, 9 Pick. 32; *Whitaker v. Mitchell*, 15 Me. 360; *Bloodgood v. Bruin*, 1 Seld. 362. Whether payment by a co-contractor will be construed to be a new promise as against the estate of the deceased co-contractor: *Atkins v. Tredgold*, 2 Barn. and Cres. 22. Whether payment by an executor would bind his co-executor: *Tulloch v. Dunn*, 1 R. and M. 416; *Cayuga Bank v. Bennett*, 5 Hill, 236; *Johnson v. Beardslee*, 15 John. 3. Whether such is the effect of payment by a co-contractor who is on the verge of bankruptcy: *Goddard v. Ingram*, 3 Q. B. 839. Or of payment from the assets of a bankrupt's estate: *Brondrum v. Wharton*, 1 Barn. and Ald. 463. Whether the debtor has a right to appropriate a payment made generally, to an item barred by the statute: *Walker v. Butler*, 6 E. and B. 506. And if he has that right in any case, under what circumstances may he exercise it; what shall raise a presumption that he has exercised it, and what effect will such appropriation have on other items in the same account: *Nash v. Hodgson*, 1 Kay, 650. Whether a verbal admission is sufficient proof of a part payment: *Willis v. Newham*, 3 Y. and J. 518. Whether the new promise to be inferred from part payment may be given in evidence under an averment contained in the declaration of payment of interest within six years, instead of giving it in evidence under a replication: *Hollis v. Palmer*, 2 Bing. N. C. 713; *Ross v. Ross*, 20 Ala. 105. Whether payment by a wife without authority from the husband on a note made by them jointly before marriage will warrant the inference of a new promise: *Neve v. Holland*, 17 Q. B. 262.

Conflicting decisions on many of these and on other similar practical questions rendered this subject an exceptional

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field of unsettled disputes, and these questions have arisen upon points so numerous and diverse that if each one was settled and reduced to a certain rule, the business man would find the rules extremely complex and difficult of application. This condition of the law at the time of the enactment is important, inasmuch as it is the duty of a Court when the construction of a statute is open to inquiry to consider "how the law stood at the making of the Act, what the mischief was, and what remedy the Legislature has provided to cure the mischief." To ascertain how the law stood at the enactment of the statute under consideration, resort must be had to adjudged cases, some of which are above referred to as exemplifying the extent of these refinements and subtle distinctions. These exceptions, originating, it is said, in judicial opposition to the harshness, real or supposed, of the letter of former statutes, have in the course of time increased in number and kind, and become complicated in the modes of their application, until the features of the original enactments supposed to underlie them are scarcely discernible through the luxuriant outgrowth.

If the Legislature had desired to retain the theory of a new and implied promise with its intricacies as well as its advantages it would have been only necessary to copy the language of the statutes on which these exceptions are supposed to be founded; but we see that that course has been carefully avoided in drafting this section; the words of the statute plainly indicate a design to institute a new rule simplifying the law as to the effect of part payment.

The express words of the statute make the fact of the payment the test for ascertaining the period within which an action may be commenced on the original promise or cause.

The fact of payment being made the test for determining when the period commences to run, the theory of requiring a new promise, or of founding an action on a presumed new promise, is abandoned, and the new promise is no longer the foundation of the plaintiff's right of action. By the letter of the section no new promise appears necessary; no new promise need be resorted to, even if the promise should

be often renewed, because the statutory limitation does not run against the original cause of action. By the words of the Act, "The limitation shall commence from the time the last payment was made."

If the difficulty of applying the complications involving this subject was the mischief, actual or imaginary, which the Legislature sought to avoid, and if that intention is expressed in the Act, we are in duty bound to carry out the intent, notwithstanding our veneration for the ancient theory, and our respect for the wisdom and learning displayed in unfolding and elucidating its subtle distinctions. If the Legislature has substituted a new and different period of limitation, not depending in any manner on the presumption of a new promise, those cases which treat only of the question whether the particular circumstances of the payment established the fact of a new promise are no longer authoritative.

The case of *Pitman v. Foster* (1 Barn. and Cres. 248), illustrates how absolutely the exceptions above mentioned rested on the theory of a new promise. In that case, suit was brought against a husband and wife and one Foster, on a promise made by Foster and the wife before the marriage. The question being whether payment made by the husband took the case out of the statute, it was said, "As the *feme covert* is incapacitated from promising in her own person, so no one could promise for her;" and, "If the husband's acknowledgment is regarded as a promise by the husband, it was a variance from the cause of action set forth in the declaration." So, also, in *Jones v. Moore* (5 Binney), and in *Betton v. Cutts* (11 N. H. 170), it was held that "an issue joined under a plea of the statute, to a declaration averring a promise to the testator, cannot be supported by an acknowledgment or payment to his personal representative;" and in *Benjamin v. De Groot* (1 Denio, 151), it was held that an acknowledgment made by an executor cannot be replied or given in evidence under an answer of *non assumpsit infra sex annos*, to a declaration setting forth a promise made to the testator.

It was doubted in *Carshore v. Huyck* (6 Barb. 483),

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whether proof of the new promise that is to be implied from payment can be given in evidence where the declaration is on an express contract. It is not necessary to cite additional cases to show that payment under circumstances which negatived the idea of a new promise would not, prior to the enactment of our statute, take a cause out of the statute; nor for the purpose of showing that in all cases where part payment became a material fact, it became so because the time of limitation had, at the commencement of the action, run against the original cause of action. The confidence with which counsel have relied on adjudications based on the theory of a new promise resting on the original consideration has induced a more extensive reference to this branch of the subject than would otherwise have been deemed necessary. As to the applicability of those adjudications it may be observed that if § 25 of our statute had been omitted, the preceding section would have left the effect of part payment precisely what counsel now claim it to be; that is, if the payment was made under circumstances from which a new promise could be inferred, it would be effectual in reviving or extending the right of action, and otherwise of no effect. But the Court is satisfied that the explicit language of § 25 was employed for the purpose of avoiding that condition of things, and for the purpose of making a definite and certain rule as to the effect of a part payment.

The circumstance that the language of this section is not copied from any of the older statutes, and that it lays down a rule differing in form and substance from any and all of those enactments which form the bases of the precedents above referred to, strongly indicates an intention to make a new rule resting on a literal construction of the language employed.

We are not aware of a similar enactment elsewhere, except in the State of Minnesota. The statute of that State contains a provision in the same words of our own, and the language of § 25 was considered by the Supreme Court of that State in *Whittaker v. Rice* (9 Minn. 13), the point there involved being the same as that decided by this Court in

Partlow v. Singer (2 Ogn. 307); that is, whether part payment, made by one of several joint makers of a promissory note, is payment within the meaning of the statute, as against the other joint makers; and the ruling was the same in the two cases. In the case in this State, Chief Justice Boise said: "Ordinarily the statute begins to run when the note is due; in this case the statute fixes the time at the date of the last payment, and such plain language can have no other meaning."

His remark, that "it was the intention of the Legislature to revive the old rule, reviving liabilities as to all on a payment made by one of several joint debtors," it is claimed, indicates the reverse of the position here taken. In support of this, it is said there would be no occasion to revive a liability if it never had been barred; but an examination of the whole case does not indicate an opinion that the original cause of action had become barred, or that the plaintiff should recover because of a new or implied promise. The plaintiff's right in that case is placed on the ground that "the statute fixes the time when the limitation shall commence;" and, by the words "old rule," is undoubtedly meant the rule that "payment by one joint contractor is payment by all," which it is there said was held in England, in Maryland and Massachusetts, but has not prevailed in New York since the case of *Van Keuren v. Parmelee* (2 Coms. 523). It is evident, from the whole tenor of the opinion, that what is said of reviving liabilities does not refer to reviving a cause of action that has been barred.

The reasonable construction of this statute is, that whatever amounts to part payment of principal or interest on an existing contract of the kind specified, made before the limitation has expired, places the creditor in a position that he may sue on the original contract at any time during the period prescribed, counting from the time of payment.

We have then only to consider what is a payment within the meaning of the statute. The appellant claims that the payment should be voluntary, and should be made by one who holds such relations as will enable him to bind his co-contractor; and he cites *Smith v. Irwin*, 37 Mo. 169; *Hath-*

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away v. Hastings, 9 Pick. 42; *Root v. Bradley*, 1 Kansas, 437.

In each of these cases it is held that payment, by an administrator, does not take the case out of the Statute of Limitations, but it is thought the reasoning upon which these decisions is based is not applicable under our statute. The decisions were rendered under provisions similar to that of § 24 of our Code, and they each lay stress upon the position that the administrator had no authority to "create a new debt" or to make a new promise, binding upon the co-obligor of the decedent. In *Smith v. Irwin* payment by the administrator is spoken of as not being voluntary, but it is mentioned in connection with the subject of an implied promise; it was held there that the administrator's acts did not establish a promise, and that there was not such relation between him and the other joint makers that an agency to make a new promise could be implied; but there is nothing in either of those causes from which it can be inferred that the Court would not have held the act of the administrator a payment within the meaning of our statute. We think any person who could be compelled by law to pay the note is competent to make the payment contemplated.

The decree of the Circuit Court should be affirmed.

J. D. BURNETT ET AL., APPELLANTS, v. DOUGLAS COUNTY, RESPONDENT.

WRIT OF REVIEW.—The office of the writ of review is to review the record and proceedings of inferior Courts, officers or tribunals acting in a judicial capacity, and in no other.

IDEM—WHAT PROCEEDINGS MAY BE REVIEWED.—It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers.

IDEM—WHEN GRANTING WRIT, A MATTER OF DISCRETION.—When the proceeding sought to be reviewed involves a matter of public interest the allowance of the writ is discretionary.

APPEAL from Douglas County.

This is an appeal from a judgment and order of the Cir-

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cuit Court for Douglas County, refusing a writ of review and for costs and disbursements.

The appellants presented to the Court, at the October term, 1873, an application for a writ to review certain proceedings had in the County Court of said county, sitting for the transaction of county business.

The petition sets forth that the petitioners are resident freeholders and taxpayers of said county, and that they signed a remonstrance against making the order sought to be reviewed. That at the March term, 1873, the County Court made an order appropriating fifteen thousand dollars for the construction of a certain road in said county. That at the May term, 1873, said Court made an order providing that the warrants issued pursuant to said first order should be marked "special appropriation." That at the September term, 1873, an order was made rescinding the order made at the May term, and providing that the warrants should be redeemed in the usual way, and taken and received in payment of taxes.

This order is fully set out in the opinion of the Court.

W. W. Thayer, John Burnett and J. D. Fay, for Appellants.

F. A. Chenoweth, District Attorney, W. R. Willis, and Watson & Lane, for Respondent.

By the Court, MCARTHUR, J. :

Under the Constitution of this State, the Circuit Courts may exercise supervisory control over all inferior tribunals, and, in exerting this power, may resort to the writ of review, which, under the Code, is a special proceeding and sustains the same relation to our system of civil procedure that the writ of *certiorari* sustains to the common law practice. The object of the writ is to enable the superior Courts to review the judicial proceedings of the inferior, with a view to keep even and uniform the administration of justice. The petition, to accord with the statute, must show that the inferior Court, officer or tribunal, in the exercise of judicial functions, made some erroneous decision in

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relation to some process issued, or some proceeding entertained. It is not the office of the writ to bring up the proceedings of any other bodies, or classes of public officers. Courts are instituted to decide judicial questions, and superior Courts review the record and proceedings of inferior Courts, or of officers or tribunals acting in a judicial capacity, and in no other. (*People v. Supervisors*, 43 Barb. 234.)

In the earlier reports of New York we find numerous cases wherein the writ was allowed and retained in cases not strictly judicial, as, for instance, *Lawton v. Commissioners*, 2 Caines, 182; *Le Roy v. Mayor of New York*, 20 Johns. 436. And, upon the authority of these cases, the writ was granted with great looseness to review most kinds of official acts, without regard to whether they were judicial or ministerial. But this looseness was checked and the law correctly stated and applied in *People v. Mayor of New York* (2 Hill, 10), wherein Bronson, J., said that a writ of *certiorari* lies only to inferior Courts, and officers who exercise judicial powers. And, *In the Matter of Mount Morris Square* (2 Hill, 14), Cowan, J., said the writ lies to inferior Courts only; basing his opinion on Bacon's Abridg., title *Certiorari*, 13, and *Rex v. Lloyd* (Cald. Cases, 309), in which case the writ was quashed, for the reason that the order sought to be reviewed was not judicial. Cowan, J., in the case cited from 2 Hill, alludes to the cases in which the Courts clearly, and without authority, departed from the principles of law applicable to *certiorari*, and after denying their authority, lays down the law to be, "that the proper office of the writ is to review simply judicial decisions or determinations." The modern decisions, with rare exceptions, proceed upon the same theory. (*People v. Board of Health*, 33 Barb. 346; *People v. Supervisors*, 43 Barb. 232.) In Ohio the same rule prevails. (*Dixon v. Cincinnati*, 14 Ohio, 240.) Also in Georgia, where it was held—in *Justices v. Hunt* (29 Geo. 155)—that when the inferior Court acted in a prudential capacity for the county, the writ would not lie.

The inquiry necessary in the case now before us is into

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the character of the order made at the September term, 1873, of the County Court of Douglas County, sitting for the transaction of county business. The order is couched in the following language: "The Court, at its May term, 1873, having made an order directing the County Clerk to indorse on all warrants issued for the construction of a certain wagon-road from the north line of Wilbur Precinct, in Douglas County, to a point five miles south of Roseburg, the words 'Special Appropriation,' for which the Court appropriated fifteen thousand dollars out of the county funds of Douglas County, for which a special tax was contemplated to be levied. It now appearing to the Court that the levy of a special tax, as contemplated by said order, is unnecessary, it is therefore ordered that there be but one levy of taxes for county purposes for the redemption of outstanding orders, and it is further considered that the county warrants indorsed 'Special Appropriation,' which have been issued, or which may be hereafter issued for the construction of said road, shall be redeemed in the same manner as other county warrants issued by the Court, and shall be received for taxes due the county as other orders are received."

In the argument counsel for appellants expressly disclaim any desire to attack the general orders relating to the assessment and levy of taxes, but simply desire to test the legality of the order just set out, which was subsequent to and distinct from the orders made in the matter of fixing the rate and levy of taxes for the year 1873.

The order above set forth was a general one, and only pointed out the means by which and the manner in which certain county warrants should be redeemed. It was not of a judicial character or nature, but was rather in the nature of an instruction or order to the proper officers, commanding them to receive and cancel a certain class of warrants in the same manner in which the general warrants are received and cancelled. In order to determine the character of the order, it is only necessary to ascertain whether, when it was made, there were any proper parties before the Court, for in all judicial proceedings there must be proper parties

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who must be, in some way, particularly affected by the judgment, order or determination. An examination of the record shows that there were no parties, in the legal acceptance of the word, before the County Court at the time the order was made. Besides, it was a general order, affecting the citizens of the county generally, and was not a particular order. That is to say, in its operation it did not and cannot affect any particular person or class of persons, but operated and will continue to operate in a very general manner upon the entire body of the taxpayers of the county. In all cases where the proceeding sought to be reviewed involves a matter of public interest affecting a great number of persons, the allowance of the writ is in the sound discretion of the Court, and if refused, the refusal is not subject to review or appeal. (*People v. Supervisors*, 15 Wend. 197; *Matter of Mount Morris Square*, 2 Hill, 16; *People v. Stillwell*, 19 N. Y. 531; *Truesdale's Appeal*, 58 Penn. 150.)

It follows that the decision of the Court below should be affirmed.

SAMUEL LEVY ET AL., APPELLANTS, v. JAMES RILEY,
ADMINISTRATOR, ET AL., RESPONDENTS.

ADMINISTRATOR—AUTHORITY REVOKED, WHEN.—When an administrator is ordered to file a new undertaking, and fails to comply with said order, thenceforward his authority shall cease, and he shall be deemed removed and his letters revoked.

PURCHASER AT SALE OF DISQUALIFIED ADMINISTRATOR.—One who purchases land at a sale by an administrator who has been thus disqualified, without knowledge of his disqualification, will be entitled to relief in equity.

APPEAL—RIGHT OF BY PURCHASER AT ADMINISTRATOR'S SALE.—A purchaser under an order of the County Court to sell land of a decedent, has no right of appeal from such order, although it should be obtained by an improper party, unless such purchaser should be (an heir or devisee of such decedent) a party required by statute to be made a party to such proceeding; neither has such purchaser any right of appeal under the statute from an order of confirmation of such sale.

APPEAL from Linn County.

The facts are stated in the opinion of the Court.

Dolph, Bronaugh, Dolph & Simon, for Appellants.

S. A. Johns and R. S. Strahan, for Respondents.

By the Court, PRIM, J.:

This was a suit in equity to enjoin respondents as administrator and administratrix of the estate of Eli B. Moore, deceased, from paying out to the creditors of said estate or otherwise disposing of certain money received by them from appellants; also from transferring a certain promissory note received by them for the purchase-price of certain real estate sold by respondents to appellants by virtue of an order of the County Court of Linn County authorizing such sale.

Respondents demurred to the complaint upon the ground that it did not contain facts sufficient to constitute a cause of suit, and the demurrer was sustained and a decree entered against appellants for cost of suit, etc.

The complaint alleges that on July 26, 1871, respondents were appointed administrators of said estate, and gave an undertaking for the faithful performance of their said trust as such in the sum of ten thousand dollars. On filing an inventory of the property of the estate it appeared that the real estate was of the value of eight thousand eight hundred and eighty-six dollars and fifty cents, and the personal property of the value of twelve thousand nine hundred and twelve dollars and nine cents. On April 25, 1872, an order was made by said County Court declaring the undertaking of said administrators to be insufficient, and requiring them to give a new one in the sum of twenty thousand dollars, to be approved by the County Judge, and that it be filed within twenty days from the date of said order.

That said respondents wholly failed to comply with said order, whereby their official position became vacated and their letters revoked, as provided by statute in such cases. Afterwards, to wit, on December 4, 1872, respondents, still pretending to be administrators of said estate, procured of the County Court an order authorizing them as administrators of said estate to sell certain real property belonging

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thereto and described in the complaint. Said property was accordingly advertised and sold by respondents to appellants; said appellants not knowing at the time of said sale that respondents had forfeited their appointment as administrators, but supposing them to have authority to act in such capacity, became the purchasers of said property at said sale. The purchase-price of said property was two thousand and fifteen dollars, gold coin; one-half to be paid down and a note to be executed for the other half. After the sale, and prior to the confirmation thereof by the County Court, appellants, having discovered the want of authority or official capacity in respondents to make said sale, appeared by attorney before said Court and remonstrated against the confirmation of said sale; but the Court, disregarding said remonstrance, ordered said sale to be confirmed.

The respondents, having demurred to the complaint, all the facts properly pleaded are to be taken as true, as therein stated.

Adopting this rule, it is admitted as true that respondents were not in fact administrators of said estate at any time during the pendency of the proceeding in the County Court to sell the land in question.

Section 1065 of the Code provides that "when a new undertaking is ordered, if the executor or administrator fail to comply therewith within five days from the entry thereof, or within such further time as the order may prescribe, thenceforward the authority of such executor or administrator shall cease, and he shall be deemed removed and his letters revoked."

Under our statute no one can sell or dispose of the property belonging to an estate of a decedent, except an executor or administrator duly appointed to perform the duties of such trust. And no sale, made by an executor or administrator, is valid unless such sale is authorized by an order of the County Court, or Judge thereof, except when a will is made by the decedent, in which provision is made authorizing the sale of certain property without such order. (Civ. Code, § 1109.)

The real property of an estate can only be sold by an administrator when it appears that the personal assets have been exhausted, and that the charges, expenses and claims, specified in § 1110, have not been satisfied. (Civ. Code, § 1113.) Under the statute no one is authorized to make the application for such sale, or make the sale when ordered, except the administrator or executor of the estate. In this proceeding it appears that the heirs of decedent were cited, and everything appears to have been regular except that the respondents, who commenced and conducted the proceeding, were not at the time administrators of the estate.

And we are here called upon to determine what was the effect of the sale made by respondents; or rather, whether appellants acquired any title to the land in question under such sale.

It is claimed by respondents, that the Court, having obtained jurisdiction of the subject-matter, by the filing of the petition of respondents, as administrators, and by the citation of the heirs, interested in the estate, that the sale is not void, but merely voidable. It is claimed, however, by appellants, that it is an absolute nullity, because made by parties who, under the law, had no right whatever to move in the matter.

In *Griffith v. Frazier* (8 Cranch, 9) it was held that “a judgment rendered against one *as administrator* who is *not such* is *void*, and the levy of an execution, issuing on such judgment, passes *no title* to the property levied on.” The difference between that case and the one here is, that judgment was rendered in that case against a party as an administrator who was not such, while here a judgment, or an order of sale, was obtained by certain parties, as administrators, who, in fact, were not such at the time. In that case Joseph Salvadore was seized of lands in which trespass was alleged to have been committed and departed this life, having first made his last will, in writing, in which he appointed Joseph Decosta one of his executors, who made probate of the will and duly entered upon his trust. A few years afterwards he left the State of South Carolina and

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resided in the State of Georgia. Letters of administration *de bonis non* were then granted to James Lamotte. Prior to the death of the decedent a judgment had been rendered against him which was revived against Lamotte as the administrator of Salvadore. Execution was issued on the judgment, and the lands of Salvadore were sold under it and conveyed by the Sheriff to a party under whom the plaintiff claimed title. The Circuit Court instructed the jury that "the letters of administration granted to Lamotte were totally void; that therefore the judgment of Bourdoux was not revived against the estate of Salvadore; that the sale and conveyance, by the Sheriff, passed no title to the purchaser." Mr. Chief Justice Marshall, in delivering the opinion of the Court, said: "The sole defect alleged in the title of the plaintiff being in that part of it which depends on the sale and conveyance of the Sheriff to Peter Freneau, the validity of the sale is the principal if not the only question in the cause.

"By the plaintiff it is contended that the letters of administration constituted Lamotte an administrator *de facto*, and rendered his acts valid, so far as third persons are interested, and exempted them from question where they can be examined only incidentally.

"By the defendant it is contended that they were granted by a person having no jurisdiction in the case, and are therefore an absolute nullity; that Lamotte was not *de facto* the administrator of Salvadore, and that his acts as such administrator stand on no better or higher ground than the acts of any other person who should assume that character. * * To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person, * * * and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. * * * But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet

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the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law." Again he says: "Suppose administration to be granted on the estate of a deceased person whose executor is present in the constant performance of his executorial duties. Is such an appointment void, or is it only voidable? In the opinion of the Court it would be an absolute nullity."

To apply the doctrine laid down by Mr. Chief Justice Marshall to this case, we will suppose a person as administrator, who in fact is not such, should apply to the Court and obtain an order to sell the land of a person not really dead, would a sale made in pursuance of such order be void or only voidable? It would be admitted by every one, we presume, that such a sale would be an absolute nullity. But, again, suppose the party should be really dead, and an administrator should be duly appointed by the proper authority to administer upon the estate of such decedent, and while such administrator should be duly engaged in discharging the duties of such trust, suppose another person as administrator, who in fact is not such, should apply to the County Court and obtain an order to sell the land of such decedent, would a sale made under such an order be void or only voidable? It appears to us such a sale would also be an absolute nullity, because the law does not authorize or permit any one except the administrator or executor to apply for such orders or to make such sales. But in this case we are not driven to the necessity of holding the sale in question to be an absolute nullity in order to warrant the Court in granting the relief demanded.

Here the sale is not attacked collaterally, but directly by an original bill, upon the ground that the order was ob-

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tained and the sale made by respondents as administrators, who in fact were not such; consequently it is immaterial whether the sale was void or only voidable; the validity of such sale is at least doubtful, and to such an extent as to operate as a cloud upon the title of appellants to the land. And there can be no doubt but that a Court of equity should exercise its equitable powers in removing the cloud from the title, or in compelling the respondents to refund the purchase-money.

But it is insisted that "appellants' remedy, if any they had, was by appeal from the order of the County Court confirming the sale." This position, we think, is not tenable. The first part of § 1134 provides that "the order of confirmation of sale in this title mentioned is conclusive as to the regularity of the sale and no further." Section 1119 provides that "at the term of Court next following the sale of real property, the executor or administrator shall make a return of his proceedings concerning such sale." And it further provides that "any of the persons cited to appear on the application for the order of sale may file objections to the confirmation."

Thus it will be seen that the purchasers at such sales are not included among those who may appear and oppose the order of confirmation, as the heirs and devisees are the only persons required by statute to be cited to appear on an application for an order to sell. (Civ. Code, § 1115.) In this case, however, it appears that appellants did appear by attorney in the County Court and object to the confirmation of the sale; but the statute failing to recognize any such right on the part of purchasers, they were there merely by the courtesy of the County Court, and not as a matter of right, consequently could take no appeal from the order of the Court confirming the sale, and they could not appeal from the order of the Court authorizing respondents to make the sale, because they were not parties to the proceeding at that time.

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1. **STOCK IN PRIVATE CORPORATION.**—When a sufficient amount of the capital stock of a private corporation has been subscribed to authorize the stockholders to proceed to the election of Directors, after the election thereof assessments may be legally made upon the unpaid stock so subscribed, and this though the corporation has increased its capital stock and the entire amount of the shares of the original stock and of the increased stock has not been subscribed. It is otherwise, where subscription to the entire number of the shares of the original as well as any contemplated increase of stock has been made a condition precedent to the exercise of the power of levying assessments. *Willamette Freighting Co. v. Stannus*, 261.
2. **STOCKHOLDERS MAY BECOME LIABLE BEFORE THE WHOLE AMOUNT OF STOCK IS SUBSCRIBED.**—Stannus subscribed for and took twenty shares of stock in a private corporation, and promised to pay the company therefor at the rate of fifty dollars per share in gold coin. The only conditions upon which the subscription was made were those contained in the articles of incorporation and the by-laws and in the instrument signed by subscribers to the stock, which "provided only that no assessment upon

the shares subscribed should become due prior to the first of April, 1870," all the assessments having been made subsequent to that time. *Held*, that his liability to pay for the shares so subscribed was not upon condition that he should not become liable until the whole stock was subscribed. *Held, also*, that the doctrine "that a subscription for stock in a corporation whose capital stock is fixed at a certain amount, or is to be determined by the Directors, is conditioned that the subscribers shall not become liable until the whole stock is subscribed," cannot apply in this case, for the proportion of stock necessary to be subscribed before the election of Directors, or rather before the organization of the company, was duly subscribed and taken before the business of the company was proceeded with. *Id.*

3. *IDEM*.—Subscription to the entire amount of stock of a corporation is not a condition precedent to legal corporate existence in this State. The doctrine that whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its Board of Directors, the power to levy assessments, is in harmony with the general incorporation laws of this State. *Id.*
4. **DENYING LEGALITY OF ASSESSMENTS—STOCKHOLDERS, WHEN ESTOPPED.**—Where assessments upon stock were levied by the stockholders by virtue of a by-law framed and adopted by the stockholders, a stockholder who assisted in framing the by-law and gave his voice for its adoption, is estopped from questioning the legality of the assessments. *Id.*
5. **INDEBTED WITHIN THE STATE—WHAT CONSTITUTES, WITHIN THE MEANING OF THE STATUTE.**—That part of the Act of December 19, 1865, which declares, "It shall be the duty of the Assessor to deduct the amount of indebtedness within this State, of any person assessed, from the amount of his or her taxable property, given under oath," construed. *Held*, 1. That there is an ambiguity in the language of the Act requiring judicial construction; 2. That the language "indebtedness within this State," has reference to the *locus in quo* of the creditor, rather than the place of the payment of the debt; 3. That although the debt sought to be deducted from the value of taxable property may have been contracted and made payable within this State, and although the creditor, at the time the debt was contracted, resided therein, yet if, at the time of the assessment, the creditor is a non-resident of the State, the indebtedness cannot be deducted. *Ankeny v. Multnomah County*, 271.

ASSESSOR.

See **ASSESSMENT**.

ASSIGNMENT.

1. **INDEMNITY BOND—WHEN NOT ASSIGNABLE.**—Where the purchaser of a business takes a bond from the seller conditioned in a certain sum as liquidated damages that the seller will not engage in business of the character sold for a stated period, such bond can only be enforced for the protection and indemnity of the buyer alone, while carrying on the business in person, and will not be extended to his assignee. In such case, there is no right of action to assign until after a breach of the conditions of the covenant. *Hillman v. Shanahan et al.*, 163.

2. **ALLEGATION OF ASSIGNMENT.**—The allegation, in complaint, that the mortgage in question "has been duly assigned and transferred to this defendant," is a sufficient allegation of assignment. It is otherwise, however, where it appears that there is a note or other contract of indebtedness, independent of the mortgage. In the latter case the mortgage is the incident of the debt, and the transfer of the latter carries with it the former. *Roberts v. Sutherland*, 219.

ATTORNEY.

1. **PAYMENT BY—WHEN OPERATES TO PREVENT STATUTE OF LIMITATIONS FROM RUNNING.**—A payment by an attorney of the principal or interest on demands collected by him for his client prevents the operation of the Statute of Limitations to bar the client's right of action against such attorney for collections retained by him. *Torrence v. Strong*, 39.
2. **CERTIFICATE.**—The attorney's certificate, in proceedings on review, should not only show that the judgment is erroneous, but in what particular. *Fulton v. Earhart*, 62.

BILL OF EXCEPTIONS.

WHEN MUST BE PRESENTED.—The bill of exceptions should be presented, allowed and signed at some time prior to the first day of the term next succeeding the term at which the cause was determined. *Holcomb v. Teal*, 352.

BILLS.

RIGHTS OF SUITORS UNDER THE CODE.—The Code, by dispensing with the classification of bills, has not taken away the right of suitors to present any cause of suit that formerly could be presented by any form of bill. *Heatherly et al. v. Hadley et al.*, 1.

BOND.

INDEMNITY BOND—WHEN NOT ASSIGNABLE.—Where the purchaser of a business takes a bond from the seller conditioned in a certain sum as liquidated damages that the seller will not engage in business of the character sold for a stated period, such bond can only be enforced for the protection and indemnity of the buyer alone, while carrying on the business in person, and will not be extended to his assignee. In such case, there is no right of action to assign until after a breach of the conditions of the covenant. *Hulman v. Shannahan et al.*, 163.

BOUNDARY.

1. **PARAMOUNT BOUNDARIES.**—Where the permanent and visible or *ascertained* boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount. *Lewis v. Lewis*, 177.
2. **JURISDICTION TO ASCERTAIN.**—The locality at which a lost stake was set may be ascertained as well in a court of law as by a suit in equity. *Id.*

BURDEN OF PROOF.

See **PROOF**, 4, 5.

CASES NOT REPORTED DURING THE TERM OF THESE
REPORTS.

- Abrahams et al. v. Flint et al.; decree affirmed.
Alberson v. Baird; appeal dismissed.
Anderson v. Baxter; judgment reversed.
Babcock v. Babcock; dismissed.
Blakesly et al v. Caywood et al.; decree reversed.
Boone v. Waymire; judgment affirmed.
Briney v. Starr; appeal dismissed.
Briney v. Starr; second appeal dismissed.
Burk et al. v. Lownsdale et al.; decree affirmed.
City of Portland v. Binder; reversed.
City of Portland v. Knott; affirmed.
Chapman et al. v. Proebstel; affirmed.
Clark et al. v. Gillespie; judgment affirmed.
Cline v. Durand; affirmed with damages.
Coggan et al. v. Rives et al.; appeal dismissed.
Cornell v. Keizer; reversed.
Cross v. Estes; judgment affirmed.
Farley v. Parker; motion to dismiss appeal overruled, and appellant allowed to file an undertaking on appeal.
Farley et al. v. Parker; judgment reversed.
Foster et al. v. Beach et al.; reversed.
Glasure v. Ish; appeal dismissed.
Goodenough v. Bancroft & Morse; affirmed.
Grant v. Ruch; appeal dismissed.
Groselouis v. Northcutt; affirmed.
Harkins v. Oliver; judgment affirmed.
Harris et al. v. Steamer Calliope; appeal dismissed.
Henderson v. Hawthorne et al.; reversed.
Henderson v. Morris; appeal dismissed.
Hollister v. Hagui; judgment affirmed.
Howard v. Grant County; appeal dismissed.
Hurd v. Ritchie et al.; reversed.
Hutson v. Douglas County; judgment affirmed.
Huston v. Goodwin et al.; judgment reversed.
Jell v. Multnomah County; judgment reversed.
Kelley v. People's T. P. Co.; judgment affirmed.
Leam v. Smith et al.; judgment affirmed.
Leam v. Wilson; judgment affirmed.
Lownsdale v. City of Portland et al.; judgment affirmed.
Mays v. Fitzgerald et al.; judgment reversed as to Fitzgerald.
McFarland v. Holland; decree modified.
McNulty v. Cozart, judgment affirmed with damages.
McQueen et al. v. Hallett; judgment affirmed.
Milwain v. Reed et al.; reversed.
Pearson v. Kennard; appeal dismissed.
Peck v. Besser; judgment affirmed.
Penter v. Penter; affirmed.

Pumphreys v. Downing; affirmed.
 Reynolds v. Sheton; judgment reversed.
 Rinehart et al. v. Dalles Military Road Co.; judgment affirmed.
 Russel v. Lewis; affirmed.
 Shepherd v. Hawley; judgment affirmed.
 Smith v. Multnomah County; judgment affirmed.
 Smith v. Ramsey; judgment reversed.
 Snipes v. Hogue; affirmed.
 Starkweather v. Standley; affirmed.
 State v. Bird; judgment reversed.
 State v. Brown; appeal dismissed.
 State v. Gibson et al.; appeal dismissed.
 State ex rel. Bellinger v. Gibbs; reversed.
 State ex rel. Steel v. Masters; affirmed.
 State v. Jones; judgment affirmed.
 State v. McMinville Water and Manufacturing Co.; reversed.
 State v. Williams; appeal dismissed.
 Steinhart et al. v. Hinch et al.; decree reversed.
 Sullens et al. v. Tomlinson et al.; decree reversed.
 Tileston v. Shannahan et al.; affirmed.
 Watts v. Hoyt; appeal dismissed.
 Wallace v. Smith; affirmed.
 White et al. v. Allen; appeal dismissed.
 White et al. v. Allen; second appeal dismissed.
 Whiteaker v. Van Schoiack et al.; appeal dismissed.
 Whitlow et al. v. Bradshaw; appeal dismissed.
 Wilhelm v. Kamm; affirmed.
 Wood v. Blodgett; judgment affirmed.
 Wright et al. v. Commercial Hotel Association; judgment affirmed.
 Zumalt v. King; affirmed.

CERTIFICATE.

1. ATTORNEY'S CERTIFICATE.—The certificate of the attorney in proceedings on writ of review must show in what particulars the proceedings brought up are erroneous. *Fulton v. Earhart*, 62.
2. REFEREE'S CERTIFICATE, HOW CONSIDERED.—He is clothed with important powers, and some weight must be given to his certificate, and some discretion allowed him in the manner of taking testimony and returning exhibits. *Bohlman v. Coffin*, 313.
3. IDEM—CERTIFIED COPIES OF EXHIBITS BY.—When an original instrument is offered in evidence before a referee, and he makes a certified copy thereof, and files and returns the certified copy as an exhibit, such exhibit will not be disregarded except in peculiar cases. *Id.*

CLAIMS.

See APPROPRIATION, 1; FUND, 1; WARRANTS, 1.

COMPENSATION.

COMPENSATION FOR TAPPING DITCH ALREADY DUG.—The compensation mentioned in § 8 of the Act of 1868, to facilitate the draining of lands for

the appropriation of an existing ditch, is in the nature of a contribution, and is distinct from the damages which the Commissioners are authorized to assess for the cutting of a new ditch. *Seely v. Sebastian et al.*, 25.

COMPLAINT.

1. COMPLAINT IN AN ACTION UPON A JUDGMENT.—Where a judgment creditor had neglected for more than one year to file a transcript of his judgment with the County Clerk and had thereby lost his power to levy on real estate, and the complaint contained no explanation of the delay: *Held*, not to be error to decide that the complaint did not lay a foundation for an action upon the judgment. *Pitser v. Russel*, 124.
2. UNDERTAKING.—In a civil action on an undertaking in the nature of bail for defendant's appearance in a criminal case, the complaint should show that the prisoner was charged with a crime, and it is not sufficient to state that he was charged with "shooting and killing" another. *Hannah v. Wells et al.*, 249.
3. CHARGE NEED NOT BE IN WRITING.—Where a defendant is brought before a committing magistrate on a charge of felony, it is not essential to the jurisdiction that the charge should be in writing. *Id.*

CONDITION SUBSEQUENT.

See DONATION ACT, 3.

CONSTRUCTION.

1. OF REPEALING STATUTE.—A statute repealing or in anywise modifying the remedy of a party by action or suit, should not be construed to affect actions or suits brought before the repeal or modification. *Newsom v. Greenwood*, 119.
2. AUDITING PUBLIC ACCOUNTS.—The provisions of § 6, p. 622, of the Compiled Laws, requiring the Secretary of State "to examine and determine the claims of all persons against the State, in cases where provisions for the payment thereof shall have been made by law," limits the action of the Secretary to cases where the law provides or enacts that the claimant is entitled to be paid by the State, and not to times when payment can be instantly made. *Brown v. Fleischner (per Upton, J., dissenting)*, 132.
3. MUNICIPAL CORPORATIONS.—The statutes creating municipal corporations are to be strictly construed against such corporation. *Robertson v. Groves et al.*, 210.
4. "GRANT, BARGAIN AND SELL."—The words "grant, bargain and sell" in a conveyance do not imply that the grantor is the absolute owner of the premises conveyed. *Taggart v. Risley (per Thayer, J., dissenting)*, 235.
5. WILLS.—The intention of the testator must be looked to in construing a will. Wills operate upon what is found to actually belong to the estate of the testator. *Jette v. Picard*, 296.
6. DEED.—To properly construe a deed it must be taken by "its four corners," and the intention of the parties, when discovered, must be carried out. *Bohlman v. Coffin*, 313.

See STATUTE, 1.

CONTRIBUTION.

See COMPENSATION, 1.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1.

CORPORATION.

1. **ASSESSMENT OF STOCK IN PRIVATE CORPORATION.**—When a sufficient amount of the capital stock of a private corporation has been subscribed to authorize the stockholders to proceed to the election of Directors, after the election thereof assessments may be legally made upon the unpaid stock so subscribed, and this though the corporation has increased its capital stock and the entire amount of the shares of the original stock and of the increased stock has not been subscribed. It is otherwise, where subscription to the entire number of the shares of the original as well as any contemplated increase of stock has been made a condition precedent to the exercise of the power of levying assessments. *Willemette Freighting Co. v. Stannus*, 261.
2. **STOCKHOLDERS MAY BECOME LIABLE BEFORE THE WHOLE AMOUNT OF STOCK IS SUBSCRIBED.**—*Stannus* subscribed for and took twenty shares of stock in a private corporation, and promised to pay the company therefor at the rate of fifty dollars per share in gold coin. The only conditions upon which the subscription was made were those contained in the articles of incorporation and the by-laws and in the instrument signed by subscribers to the stock, which "provided only that no assessment upon the shares subscribed should become due prior to the first of April, 1870," all the assessments having been made subsequent to that time. *Held*, that his liability to pay for the shares so subscribed was not upon condition that he should not become liable until the whole stock was subscribed. *Held, also*, that the doctrine "that a subscription for stock in a corporation whose capital stock is fixed at a certain amount, or is to be determined by the Directors, is conditioned that the subscribers shall not become liable until the whole stock is subscribed," cannot apply in this case, for the proportion of stock necessary to be subscribed before the election of Directors, or rather before the organization of the company, was duly subscribed and taken before the business of the company was proceeded with. *Id.*
3. **IDEM.**—Subscription to the entire amount of stock of a corporation is not a condition precedent to legal corporate existence in this State. The doctrine that whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its Board of Directors, the power to levy assessments, is in harmony with the general incorporation laws of this State. *Id.*
4. **DENYING LEGALITY OF ASSESSMENTS—STOCKHOLDERS, WHEN ESTOPPED.**—Where assessments upon stock were levied by the stockholders by virtue of a by-law framed and adopted by the stockholders, a stockholder who assisted in framing the by-law and gave his voice for its adoption, is estopped from questioning the legality of the assessments. *Id.*

See MUNICIPAL CORPORATION, 1.

COSTS.

1. **DECISION CONCERNING MAY BE REVIEWED.**—The decision of a Circuit Court determining the amount of costs taxable in a case, may be reviewed in the Supreme Court on appeal. *Cross v. Chichester*, 114.
2. **COST-BILL.**—In taxing costs the practice requires a cost-bill or statement of disbursements, which must state the items separately, specifying the amount of each item and for what the expense is incurred, and it must be verified. *Id.*
3. **VERIFICATION.**—Such verification is sufficient, if the party deposes that the items of the bill or statement are correct as the deponent verily believes, and that the liability has been necessarily incurred. *Id.*
4. **OBJECTION TO COST-BILL.**—The written objection to the bill need not be on oath, but it must point out particularly the errors in the bill. *Id.*

COUNTY.

CANNOT PRE-EMPT LAND IN THIS STATE UNDER THE ACT OF CONGRESS OF MAY 26TH, 1824.—The Act of Congress of May 26th, 1824, "granting to the counties or parishes of each State or Territory of the United States, in which the public lands are situated, the right of pre-emption to a quarter section of land for seats of justice in the same," was never in force in this State. Neither was the Town-site Act of May 23d, 1844, in force in this State prior to July 14th, 1854. *Willow v. Reese*, 335.

COUNTY COMMISSIONERS.

See COUNTY COURT, 1, 2.

COUNTY COURT.

1. **JURISDICTION OF.**—Under the Act of 1868, to facilitate the draining of lands in certain cases, the Board of County Commissioners have jurisdiction to locate a ditch where there is none. They are not authorized to tap the ditch of an adjoining proprietor and assess damages and benefits to such proprietor. *Seely v. Sebastian et al.*, 25.
2. **JURISDICTION OF COUNTY COURT TO LAY OUT ROADS—GENERAL JURISDICTION OF.**—The County Court is a court of record, but its general jurisdiction is to be defined, regulated and limited by law. The statute prescribes its powers and its mode of proceeding in laying out roads. It has no power over the subject until the prescribed petition and proof of notice is presented. *Johns v. Marion County*, 46.
3. **JURISDICTION OF COUNTY COURT.**—The County Court is a court of limited and special jurisdiction. *State v. Officer*, 180.
4. **WHAT RECORD SHOULD SHOW.**—The record of the County Court should show affirmatively that it had jurisdiction of the person and subject-matter affected by its proceedings. *Id.*
5. **WHAT RECORD INSUFFICIENT.**—A record of the County Court, made in the matter of the location of a county road, which reads, "The bond and proof of posting notices having been made to the satisfaction of the

Court," etc., is insufficient to show that the Court had acquired jurisdiction of the persons of parties whose rights might be affected by the location of such road. *Id.*

6. JURISDICTION OF.—The Constitution of this State provides that County Courts shall be courts of record having general jurisdiction, to be defined and limited by law; and the Legislature having given them exclusive and original jurisdiction in all matters pertaining to Probate Courts: *Held*, that County Courts, in exercising judicial powers in such business, should be regarded as courts of general and superior jurisdiction. *Tustin v. Gaunt*, 305.
7. *IDEM*—PRESUMPTIONS.—Whenever their proceedings and judgments come in question collaterally, they are entitled to all the legal presumptions pertaining to the records of courts of superior jurisdiction. *Id.*
8. PROCEEDINGS IN COUNTY COURT, HOW IMPEACHED.—The proceedings and judgments of County Courts in probate matters import absolute verity, and whenever they come in question collaterally cannot be impeached by evidence *aliunde* the record; but may be impeached by evidence appearing upon the face of the record showing a want of jurisdiction in the Court. *Id.*
9. WHEN THE RECORD IS SILENT.—Legal presumptions do not come to the aid of the record, except as to facts touching which the record is silent. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done. If appellant was a minor, and had no guardian when the order of sale was made, it was the duty of the Court to appoint one before making such order; but the record being silent, the law presumes the Court did its duty. No evidence *aliunde* the record will be admitted to impeach the proceedings and orders of a court of general and superior jurisdiction. *Id.*

COURTS.

COURTS MAY MAKE RULES.—Under our system all Courts have certain powers to be exercised for the purpose of methodically disposing of all cases brought before them. They can establish such rules in relation to the details of the business as shall best serve this purpose, having proper regard for the rights of parties litigant, as guaranteed and recognized by the Constitution and the laws. *Carney v. Barrett*, 171.

See COUNTY COURT, 2, 3, 6, 7.

COVENANT.

See DEED, 5, 6, 7.

COVERTURE.

WIFE'S RIGHT OF ACTION AT LAW.—A divorced wife cannot maintain an action at law against her divorced husband upon an implied contract arising during coverture. *Pittman v. Pittman*, 298.

CRIME.

See INDICTMENT, 5.

DECISION OVERRULED.

Schirott & Groner v. Phillippi & Coleman (3 Ogn. 484), overruled so far as it is there held that appeal and review are concurrent remedies. Same case approved so far as it holds that review will lie in a cause (otherwise proper) where the time for appealing has elapsed. *Evans v. Christian*, 375.

DECREE.

1. RECITALS IN, WILL NOT PRECLUDE A PARTY FROM DENYING, WHEN.—A recital in a decree, "that notice has been given in due form of law," will not preclude a party from denying the jurisdiction in a suit brought to reform the decree. When the decree contains a recital that due service was made and the return purports to set out the mode of service and the mode set out is insufficient, the recital will not aid the return. *Heatherly et al. v. Hadley et al.*, 2.
2. DECREE DOES NOT CONFER LEGAL OR EQUITABLE RIGHT TO PROPERTY, WHEN.—In a suit for a divorce, where the complaint contains no allegations concerning property and the decree contains nothing on the subject, the party at whose prayer the decree is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree. *Bamford v. Bamford et al.*, 30.
3. FINAL DECREE CANNOT BE DISTURBED.—The decree of divorce having become final cannot be disturbed, unless by a suit in the nature of a bill of review. Where one seeks to open a judgment or decree, it should be shown that the party applying is without fault, or that the fault is excusable. It is not a sufficient excuse that the defendant had executed a fraudulent conveyance to a third party before the suit for divorce was begun. The statement of an opinion or conclusion is not sufficient. *Id.*
4. JUDGMENT-ROLL.—When real property is transferred by a decree of divorce, the judgment-roll should contain a description of the land transferred. *Id.*
5. NOTICE OF APPEAL FROM.—The notice of appeal from a decree need not specify the grounds of error. *Lewis v. Lewis*, 209.

DEDICATION.

1. IN WHAT MANNER DEDICATION MAY BE MADE.—A dedication to public use may be by parol as well as by deed. To constitute a dedication by parol, there must be some act or acts proved, evincing a clear intention to devote the premises to the public use. *Carter v. The City of Portland*, 339.
2. *IDEM.*—If one owning lands or having an equitable interest therein (subsequently acquiring the title thereto), lays out a town thereon, and makes and exhibits a map or plan thereof, with spaces marked streets, alleys, public squares, parks, etc., and sells lots with clear reference to said map or plan (though unrecorded), the purchasers of lots in said town acquire, as appurtenant thereto, every easement, privilege and advantage which the map or plan represents as part of the town. Upon the sale of lots with such reference to the map or plan, the dedication of the spaces marked streets, alleys, public squares, parks, etc., becomes irrevocable. *Id.*

3. ACCEPTANCE AND USE.—Formal acceptance by the corporate authorities is not necessary. Where the dedication is irrevocable, it need not be followed by immediate and continued use. *Id.*

DEED.

1. EVIDENCE OF MISTAKE IN.—Unless the evidence shows the alleged mistake clearly and satisfactorily, it is not sufficient to establish cause for the correction of a deed. *Lewis v. Lewis*, 177.
2. DESCRIPTION IN DEED.—A clerical error in the description of a tract of land will not vitiate a deed where the intent of the parties can be ascertained with certainty from the instrument, when considered in connection with the situation of the parties and of the subject-matter. *Mathews v. Eddy*, 225.
3. DEED CONVEYS AFTER-ACQUIRED TITLE, WHEN.—If the terms of a deed clearly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty. *Taggart v. Risley*, 235.
4. *IDEM*.—Where a grantor covenants to warrant the premises against all persons claiming by, through or under himself, and he subsequently acquires the legal title to the premises, that legal title will inure to the benefit of the grantee. *Id.*
5. CONVEYANCE.—The office of our modern conveyances is simply to convey the estate which the grantor has. It is the policy of the law to bind a party to a deed only by express stipulation covenant. *Taggart v. Risley* (*per Thayer, J., dissenting*), 235.
6. *IDEM*—EFFECT OF THE WORDS "GRANT, BARGAIN AND SELL."—The words "grant, bargain and sell" in a conveyance do not imply that the grantor is the absolute owner of the premises conveyed. *Id.*
7. *IDEM*—COVENANTS IN.—A covenant to defend the grantee, his heirs and assigns, in the quiet and peaceable possession of the property conveyed, against the claims of the covenantor or persons claiming under him, necessarily refers to existing claims, not to those which the covenantor may thereafter acquire. The object of such a covenant is to defend the grantee against acts done or suffered to be done by the covenantor, whereby the title conveyed may be jeopardized; nor does such a covenant operate as a personal obligation of the covenantor not to buy an outstanding claim against the property, and he is not estopped by such covenant to buy and assert such an outstanding claim. Matter in a deed to operate as an estoppel must be of such a character that, if untrue, the party alleging it would be liable in some form of action, either in law or in equity, to respond in damages to the party injured for a covenant broken or for a deceit and fraud. *Id.*
8. CONSTRUCTION OF DEED.—To properly construe a deed it must be taken by "its four corners," and the intention of the parties, when discovered, must be carried out. *Bohlman v. Coffin*, 313.

DEFENSE.

1. **DEFENSE CANNOT BE DEMURRED TO, WHEN.**—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on motion. *Torrence v. Strong*, 39.
2. **POSSESSION OF MORTGAGEE.**—The possession of a mortgagee, after default, obtained with the assent of the mortgagor, is a good defense against an action of ejectment, brought by the mortgagor, so long as the mortgage debt remains unpaid. *Roberts v. Sutherland*, 219.

DEMURRER.

DEFENSE—WHEN CANNOT BE DEMURRED TO.—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on demurrer. *Torrence v. Strong*, 39.

DENIAL.

1. **PLEADINGS—SUFFICIENCY OF A DENIAL.**—Where in an action for the recovery of damages, the defendant pleads accord and satisfaction, and the replication denies that "in consideration of the payment of seventy-five dollars, or any other sum and the surgeon's fee," mentioned in the answer, the plaintiffs "accepted the same in full satisfaction and discharge of the damages," etc.: *Held*, that while this is an admission of the payments, it is a denial of their acceptance in discharge of the damages claimed, and, therefore, a sufficient denial of the settlement set up in the answer. *O'Riley v. Wilson*, 96.
2. **DENIAL OF VALUE.**—A denial that property sued for is of the exact value alleged in the complaint is an admission of any less value. *Scott v. Barney*, 288.
3. **IDEM—CONJUNCTIVE DENIALS.**—Facts stated conjunctively in a complaint should not be denied in the answer as a whole, as conjunctively stated, but should be disjunctively denied in order to raise an issue. *Id.*

DESCENT.

LANDS UNDER THE DONATION ACT.—The restrictions upon the descent of lands granted under § 4 of the Act of Congress, relating to public lands in Oregon, approved September 27, 1850—commonly called the Donation Act—do not apply to lands granted under § 5 of the same Act. Lands granted under § 5 of said Act descend in accordance with the provisions of the Statute of Descents, and of the common law. *Chambers v. Chambers et al.*, 153.

DESCRIPTION.

1. **REAL ESTATE TRANSFERRED BY DECREE.**—Real estate transferred by a decree of divorce should be described in the judgment-roll. *Bamford v. Bamford et al.*, 30.
2. **DEED.**—A clerical error in the description of a tract of land will not vitiate a deed where the intent of the parties can be ascertained with certainty from the instrument, when considered in connection with the situation of the parties and of the subject-matter. *Mathews v. Eddy*, 225.

3. **UNDERTAKING, DESCRIPTION OF CRIME IN.**—Every killing of a human being is presumed to be unlawful. The words "shooting and killing" describe a crime generally, and, in an undertaking, in a criminal proceeding, are a sufficient description of the crime charged to create a liability against the sureties thereon. *Hannah v. Wells et al.* (per *McArthur, J., dissenting*), 249.

DISBURSEMENTS.

See *COSTS*, 1-4.

DISCRETION.

1. **AMENDING PLEADINGS.**—Discretion in the amendment of pleadings is in the Circuit Court. *Bamford v. Bamford et al.*, 30.
2. **WRIT OF REVIEW.**—The allowance of the writ of review is discretionary, when the proceedings sought to be reviewed involve a matter of public interest. *Burnett v. Douglas County*, 388.

DISTRICT ATTORNEY.

AUTHORITY TO BRING ACTION IN HIS OWN NAME.—The District Attorney is authorized by statute to sue as plaintiff in a civil action brought on an undertaking given as bail in a criminal case. *Hannah v. Wells et al.*, 249.

DIVORCE.

1. **DECREE DOES NOT CONFER LEGAL OR EQUITABLE RIGHT TO PROPERTY, WHEN.**—In a suit for a divorce, where the complaint contains no allegations concerning property and the decree contains nothing on the subject, the party at whose prayer the decree is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree. *Bamford v. Bamford et al.*, 30.
2. **JUDGMENT-ROLL IN DIVORCE SUIT.**—When real property is transferred by a decree of divorce, the judgment-roll should contain a description of the land transferred. *Id.*
3. **ISSUES CONCERNING PROPERTY IN DIVORCE SUIT.**—Although a Court may first pass upon the question of granting or denying the divorce and afterwards investigate and determine the issues concerning property, the subsequent investigation must be had in the same suit. *Id.*

DONATION ACT.

1. **DESCENT OF LANDS UNDER THE DONATION ACT.**—The restrictions upon the descent of lands granted under § 4 of the Act of Congress, relating to public lands in Oregon, approved September 27, 1850—commonly called the Donation Act—do not apply to lands granted under § 5 of the same Act. Lands granted under § 5 of said Act descend in accordance with the provisions of the Statute of Descents, and of the common law. *Chambers v. Chambers et al.*, 153.
2. **THE DONATION ACT IS A PRESENT GRANT.**—The language of the Donation Act of September 27, 1850, operated in favor of the actual settler, who was under no disability, as a present grant, and vested in the donee a legal title to the land before the issuing of the patent. *Blakesly v. Caywood*, 279.

3. **IDEM—DONEE TAKES UPON CONDITIONS SUBSEQUENT.**—By the operation of the Donation Act the donee acquires the land in fee subject to the conditions specified in the Act. They are conditions subsequent, and it is in the power of the donee to render the estate absolute by performance of the conditions. *Id.*
4. **IDEM—GRANT IS NOT VOID WHERE ALIEN DIES BEFORE NATURALIZATION.**—The proviso in the fourth section of the Act that no alien shall be entitled to patent until he becomes naturalized does not render the grant void upon the death of such alien without naturalization. *Id.*
5. **RIGHTS OF MARRIED WOMEN.**—L. took up two hundred and sixty-three and fifty-three one-hundredths acres of land under § 4 of the Donation Law, and, being married at the time, held that his wife was entitled to have one-half thereof set apart to her. The right of the wife in no way depends upon the number of acres in the claim. *Jette v. Picard*, 296.

DRAINING LAND.

See COUNTY COURT, 1.

EASEMENT.

RIGHT OF ENTRY FOR REPAIRS.—One who has a right to the enjoyment of an easement has a right to enter for the purpose of repairs, as against the owner of the servient estate, whenever the easement cannot be otherwise enjoyed; and he has the right to dig up and use the adjacent soil for the purpose of repairs whenever there is no other mode. *Thompson v. Uglow*, 369.

EMPLOYEE.

EMPLOYEE TAKES THE RISK INCIDENT TO HIS EMPLOYMENT.—If an employee works with or near machinery which is unsafe, and from which he is liable to sustain injury by reason of its condition, he takes the risk incident to the employment, and cannot maintain an action against his employer for injuries sustained by reason of the defective condition of the machinery. *Stone v. Oregon City Mfg. Co.*, 52.

See EMPLOYER.

EMPLOYER.

RESPONSIBILITY OF EMPLOYER FOR DEFECTIVE MACHINERY.—An employer who provides machinery and controls its operations, must see that it is suitable; and if an injury to the workmen happen by reason of defect unknown to the latter, and which the employer by use of ordinary care could have cured, such employer is liable for the injury. *Stone v. Oregon City Mfg. Co.*, 52.

See EMPLOYEE.

ENTRY.

See EASEMENT.

EQUITY.

1. **CLASSIFICATION OF BILLS DISPENSED WITH—RIGHTS OF SUITORS.**—The Code, by dispensing with the classification of bills, has not taken away
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- the right of suitors to present any cause of suit that formerly could be presented by any form of bill. *Heatherly et al. v. Hadley et al.*, 1.
2. JURISDICTION.—Having obtained jurisdiction for one purpose, a Court of equity may retain it for all purposes connected with the transaction. *Id.*
 3. REFORMING WRITTEN INSTRUMENT.—In order to warrant a Court of equity in decreeing the reformation of a written instrument, the testimony must be clear and satisfactory. *Newsom v. Greenwood*, 119.
 4. COURT OF EQUITY WILL INTERPOSE, WHEN.—Mere mental weakness, or inadequacy of consideration standing alone, will not warrant the interference of a Court of equity in ordinary cases; but where both these elements are present, equity will take jurisdiction. *Scovill v. Barney*, 288.

ERROR.

1. WHEN FINDING IS AN ERROR OF LAW.—If the allegations of a complaint are fully proved and there is no conflict of evidence, it is an error of law to find the contrary. *Fulton v. Earhart*, 62.
2. RECEIVING VERDICT.—It is error to receive the verdict of a jury in the absence of the defendant where the crime charged is a felony. *State v. Spores*, 198.
3. INSTRUCTIONS.—Where issue is joined on the merits in an action for goods sold and delivered, it is error to instruct that if the plaintiff had sold the demand before the commencement of the action he cannot recover. *Derkeny v. Belfile*, 258.
4. DOES NOT AFFIRMATIVELY APPEAR, WHEN.—Where the record does not disclose whether or not the mode of making repairs depends on the construction of a written instrument, error does not affirmatively appear from a statement in the record that the Court instructed the jury that the defendant was not obliged to bring soil from elsewhere to repair a ditch conveying water over the plaintiff's land. *Thompson v. Uglow*, 369.

See DEED, 2.

ESTOPPEL.

1. GRANTOR, WHEN ESTOPPED.—If the seizin or possession of a particular estate is affirmed in a deed, either in express terms or by necessary implication, the grantor and all persons in privity with him will be estopped from ever afterwards denying such seizin or possession. *Taggart v. Risley*, 235.
2. COVENANTS IN DEED.—A covenant to defend the grantee, his heirs and assigns, in the quiet and peaceable possession of the property conveyed, against the claims of the covenantor or persons claiming under him, necessarily refers to existing claims, not to those which the covenantor may thereafter acquire. The object of such a covenant is to defend the grantee against acts done or suffered to be done by the covenantor, whereby the title conveyed may be jeopardized; nor does such a covenant operate as a personal obligation of the covenantor not to buy an outstanding claim against the property, and he is not estopped by such covenant to buy and assert such an outstanding claim. Matter in a deed to operate as an estoppel must be of such a character that, if un-

true, the party alleging it would be liable in some form of action, either in law or in equity, to respond in damages to the party injured for a covenant broken or for a deceit and fraud. *Taggart v. Risley (per Thayer, J., dissenting)*, 235.

3. **DENYING LEGALITY OF ASSESSMENTS.**—A stockholder who assisted in framing and voted to adopt by-laws, by virtue of which assessments are levied upon his stock, is estopped from questioning the legality of the assessments. *Willamette Freighting Co. v. Stannus*, 262.

ESTRAY.

1. **WHAT CONSTITUTES AN ESTRAY.**—Our statute does not define an estray, but merely provides where, when, and how they may be posted. An estray is an animal that has escaped from its owner, and wanders or strays about—usually defined at common law as a wandering animal whose owner is unknown. An animal cannot be an estray when on the range where it was raised, and permitted by its owner to run, and especially when the owner is known to the party who takes it up. The fact of his being breachy or vicious has reference only as to when he may be taken up. *Shepherd v. Hawley*, 206.
2. **IDEM—WHEN MAY BE TAKEN UP.**—An animal to be taken up and posted as an estray in the months of August and September, must be not only an estray, but either breachy or vicious. *Id.*

EVIDENCE.

1. **PREPONDERANCE OF.**—A finding of fact is not open to review simply on a question as to the preponderance of evidence. *Fulton v. Earhart*, 61.
2. **WHERE THERE IS NO CONFLICT OF EVIDENCE, WHAT WILL BE ERROR.**—If the allegations of a complaint are proved and there is no conflict of evidence, it is an error of law to find the contrary. *Fulton v. Earhart*, 62.
3. **EVIDENCE PRESUMED.**—The law will presume there was evidence to support a finding unless the contrary affirmatively appears. *Id.*
4. **EVIDENCE OF THREATS.**—In a trial for murder where the defense is justifiable homicide, it is competent to prove the language and conduct of deceased towards defendant some days prior to the killing; the testimony showing that defendant was in fear of deceased at such time, and tending to show that he was in imminent peril of an attack from deceased at the time of the killing. *State v. Dodson*, 64.
5. **MISTAKE IN DEED.**—Unless the evidence shows the alleged mistake clearly and satisfactorily, it is not sufficient to establish cause for the correction of a deed. *Lewis v. Lewis*, 177.
6. **TO IMPEACH RECORD.**—No evidence *aliunde* the record will be admitted to impeach the proceedings and orders of a court of general and superior jurisdiction. *Tustin v. Gaunt*, 305.
7. **DEDICATION.**—A dedication to public use may be by parol as well as by deed. To constitute a dedication by parol, there must be some act or acts proved, evincing a clear intention to devote the premises to the public use. *Carter v. The City of Portland*, 339.
8. **IDEM—WHAT CONSTITUTES.**—If one owning lands or having an equitable interest therein (subsequently acquiring the title thereto), lays out a

town thereon, and makes and exhibits a map or plan thereof, with spaces marked streets, alleys, public squares, parks, etc., and sells lots with clear reference to said map or plan (though unrecorded), the purchasers of lots in said town acquire, as appurtenant thereto, every easement, privilege and advantage which the map or plan represents as part of the town. Upon the sale of lots with such reference to the map or plan, the dedication of the spaces marked streets, alleys, public squares, parks, etc., becomes irrevocable. *Id.*

EXCEPTIONS.

1. **WHAT BILL OF EXCEPTIONS SHOULD SHOW.**—A bill of exceptions should show that the same point presented in the appellate Court was raised in the Court below. *State v. Dodson*, 64.
2. **SUFFICIENCY OF SURETIES.**—Exception to the sufficiency of sureties to an undertaking on appeal must be made within five days from the filing of the undertaking. *Lewis v. Lewis*, 209.
3. **BILL OF EXCEPTIONS.**—The bill of exceptions should be presented, allowed and signed at some time prior to the first day of the term next succeeding the term at which the cause was determined. *Holcomb v. Teal*, 352.

EXECUTION.

MECHANIC'S LIEN.—When judgment is rendered to enforce a mechanic's lien, execution may issue thereon to sell the premises. *Kendall v. McFarland*, 292.

EXHIBIT.

See **CERTIFICATE**, 2, 3.

FINDINGS OF FACT.

See **VERDICT**, 2, 3.

FORFEITURE.

PROPERTY IN TRUST—GRANTOR'S INTEREST IN.—A grantor of property in trust for a specific purpose retains such an interest therein as entitles him in equity to insist on a specific execution of the trust; but a diversion of trust property by a trustee from the purpose for which it was granted does not operate as a forfeiture of the property or cause it to revert to the donor. *Bybee v. Summers*, 352.

FUND.

1. **LAW MUST CREATE, WHEN.**—Every law that imposes or authorizes a tax must create a fund unless a fund already exists, into which the tax is to be paid. *Brown v. Fleischer* (per *Upton, J., dissenting*), 132.
2. **IDEM.**—When a statute provides that the State shall pay for particular services, if there is no special requirement that the claim shall be paid out of a particular or special fund, it will be payable out of the general fund. *Id.*

HIGHWAY.

See **ROADS**.

INDEMNITY.

See BOND.

INDICTMENT.

1. **FORM OF INDICTMENT.**—The form of indictment referred to in § 71 of the Criminal Code is sufficient. *State v. Dodson*, 64.
2. **AGAINST OFFICER FOR TAKING ILLEGAL COMPENSATION.**—Where the statute makes it a criminal offense "willfully and knowingly to charge, take or receive any fee or compensation, other than that authorized or permitted by law, for any official service or duty performed" by an officer, the indictment should show for what service or duty the charge was made or the money taken. *State v. Packard*, 157.
3. **AGAINST OFFICER FOR FELONIOUSLY RECEIVING MONEY FOR SALARY.**—An indictment under § 636 of the Criminal Code, charging the defendant with having received two hundred and fifty dollars feloniously for the payment of the amount of salary due him, should state the length of time the salary was unpaid, or otherwise designate the service or duty charged for. *State v. Perham*, 188.
4. **INDICTMENT.**—It is not the intention of the Code to abolish or dispense with any of the essential requirements of an indictment as sanctioned by the wisdom and experience of the past, and determined by the well-established rules of sound reason. None of the substantial elements of a good indictment, as tested by the long-established principles of criminal jurisprudence, are ignored by our statute. *State v. Dougherty et al.*, 200.
5. **IDEM—DESCRIPTION OF ACTS CONSTITUTING THE CRIME.**—The indictment should contain such a specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the Court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law. *Id.*
6. **CHARGE NEED NOT BE IN WRITING.**—Where a defendant is brought before a committing magistrate on a charge of felony, it is not essential to the jurisdiction that the charge should be in writing. *Hannah v. Wells*, 249.
7. **MAYHEM.**—Any offense made punishable by § 527 of the Criminal Code may be denominated mayhem in indictments. *State v. Vowels*, 324.

INJURY.

1. **WHEN EMPLOYEE CANNOT RECOVER FOR.**—A person employed to work with or around dangerous machinery, is bound to exercise his thinking faculties and give careful attention as to how he passes around it; and if he fail to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury. *Stone v. Oregon City Mfg. Co.*, 52.
2. **EMPLOYEE TAKES THE RISK INCIDENT TO HIS EMPLOYMENT.**—If an employee works with or near machinery which is unsafe, and from which

he is liable to sustain injury by reason of its condition, he takes the risk incident to the employment, and cannot maintain an action against his employer for injuries sustained by reason of the defective condition of the machinery. *Id.*

INSTRUCTIONS.

1. **TITLE TO PROPERTY—WHEN A QUESTION FOR THE JURY.**—In an action against a sheriff for failing and refusing to levy upon property sold by the judgment-debtor prior to the execution, and remaining in his possession, the Court instructed the jury that the title to the property so sold was in the judgment-debtor, and that such property was subject to the execution: *Held*, that the instruction was error. It should have been left to the determination of the jury whether the sale was made in good faith or not. *Moore v. Floyd et al.*, 101.
2. **ACTION FOR GOODS SOLD AND DELIVERED.**—Where issue is joined on the merits in an action for goods sold and delivered, it is error to instruct that if the plaintiff had sold the demand before the commencement of the action, he cannot recover. *Derkeny v. Belfls*, 258.

INTENDMENTS.

INTENDMENTS IN FAVOR OF THE JUDGMENT.—Every intendment is in favor of the regularity and correctness of a judgment of a Court having jurisdiction. *Fulton v. Earhart*, 62.

INTERLOCUTORY ORDER.

PARTITION.—In a suit for partition of real estate, the order or decree of the Court directing the partition or the sale of the premises without further proceedings, is not a final decree, but only an interlocutory order, and is not notice to parties and their privies, etc., under the provisions of § 15, p. 154 of the Statutes of 1856. *Bybee v. Summers*, 354.

IRREGULARITIES.

IRREGULARITIES THAT GO TO THE JURISDICTION.—The rule that a judgment should not be reversed for errors not affecting a substantial right, does not apply to irregularities that go to the jurisdiction of the Court. *Johns v. Marion County*, 46.

JUDGMENT.

1. **INTENDMENTS ARE IN FAVOR OF THE JUDGMENT.**—Every intendment is in favor of the regularity and correctness of a judgment of a Court having jurisdiction. *Fulton v. Earhart*, 62.
2. **JUDGMENT FOR WANT OF AN ANSWER.**—Under the Code a judgment for want of an answer cannot be appealed from. *Smith et al. v. Ellendale Mill Co.*, 70.
3. **WHEN JUDGMENT FOR WANT OF AN ANSWER CAN BE TAKEN.**—A judgment for want of an answer can only be taken when it appears that defendant has been *duly served with summons* and has failed to answer the complaint within the time allowed by law. *Id.*
4. **RIGHT TO SUE UPON A JUDGMENT.**—A judgment-creditor cannot claim a strict right to sue upon his judgment as often as he may choose, without

showing any necessity for such course. Neither the common law nor the practice in the various States, nor anything inherent in the subject, gives to a judgment-creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment. *Pitzer v. Russel*, 124.

5. COMPLAINT IN AN ACTION UPON A JUDGMENT.—Where a judgment-creditor had neglected for more than one year to file a transcript of his judgment with the County Clerk and had thereby lost his power to levy on real estate, and the complaint contained no explanation of the delay: *Held*, not to be error to decide that the complaint did not lay a foundation for an action upon the judgment. *Id.*
6. SALE OF MORTGAGED PREMISES.—Where a judgment was obtained in an action at law upon a promissory note, and a tract of land, which had been mortgaged to secure the note, was sold on the execution without foreclosure of the mortgage, and the sale had been confirmed: *Held*, that the sale is not void, and that it cannot be attacked collaterally. *Mathews v. Eddy*, 225.
7. APPEAL:—A party cannot claim the benefit of a judgment and at the same time appeal from it. *Moore v. Floyd*, 260.

JUDGMENT LIEN.

See LIEN, 1.

JUDGMENT-ROLL.

1. SHOULD CONTAIN A DESCRIPTION OF REAL PROPERTY, WHEN.—When real property is transferred from one party to another by a decree of divorce, the judgment-roll should contain a description of the land transferred. *Bamford v. Bamford et al.*, 30.
2. RETURN FORMS PART OF JUDGMENT-ROLL.—The return made in obedience to a writ of review forms part of the judgment-roll, and is properly included in the transcript without a statement or bill of exceptions. *Johns v. Marion County*, 46.
3. RECORD.—Under the Code the record includes all the papers and proceedings contained in the judgment-roll. *Tustin v. Gawnt*, 305.

JUDGMENT SALE.

See SALE, 1.

JURISDICTION.

1. EQUITY.—Having obtained jurisdiction for one purpose, a Court of equity may retain it for all purposes connected with the transaction. *Heatherly et al. v. Hadley et al.*, 1.
2. WANT OF JURISDICTION MUST SPECIALLY APPEAR.—Nothing shall be intended to be out of the jurisdiction of a Superior Court, except that which specially appears to be so. *Id.*
3. RECORD RECITAL OF JURISDICTIONAL FACTS.—If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked collaterally. *Id.*

4. **WHERE THE RECORD IS SILENT AS TO JURISDICTIONAL FACTS.**—If the record is silent as to jurisdictional facts, they will be presumed to have been duly established, but such presumption may be rebutted by extrinsic evidence. *Id.*
5. **WHERE WANT OF JURISDICTION APPEARS.**—If it appears by the record expressly, or by necessary implication, that the cause of action was beyond the jurisdiction of the Court, or that the Court proceeded without notice to the parties, no presumption in favor of the jurisdiction arises, and the judgment will be void. *Id.*
6. **STRICT COMPLIANCE WITH THE STATUTE NECESSARY.**—When a Court of record seeks to acquire jurisdiction by a course specially pointed out by statute, a strict compliance with the statute is necessary. *Id.*
7. **A PARTY IS NOT PRECLUDED BY THE RECITALS IN A DECREE.**—A recital in a decree "that notice has been given in due form of law," will not preclude a party from denying the jurisdiction in a suit brought to reform the decree. When the decree contains a recital that due service was made and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. *Id.*
8. **EXTRINSIC EVIDENCE IN AID OF THE RECORD.**—When extrinsic evidence is admitted in aid of the record, the fact permitted to be proved in a subsequent proceeding is not solely that process was not in fact served, but that there was proof of service before the Court that rendered the decree. *Id.*
9. **JURISDICTION OF COUNTY COMMISSIONERS.**—The Act of 1868, to facilitate the draining of lands in certain cases, only gives to the Board of County Commissioners jurisdiction to locate a ditch where there is none. The Commissioners are not authorized to tap the ditch of an adjoining proprietor and assess damages and benefits to such proprietor. *Seely v. Sebastian et al.*, 25.
10. **MUST SHOW JURISDICTION.**—The return should show that the tribunal had jurisdiction. It is a general rule that Courts of limited and general jurisdiction, when exercising a special limited power, conferred by statute, must show affirmatively that jurisdiction has been acquired. *Johns v. Marion County*, 46.
11. **PETITION AND PROOF OF NOTICE NECESSARY TO GIVE JURISDICTION.**—The County Court is a court of record, but its general jurisdiction is to be defined, regulated and limited by law. The statute prescribes its powers and its mode of proceeding in laying out roads. It has no power over the subject until the prescribed petition and proof of notice is presented. *Id.*
12. **IRREGULARITIES THAT GO TO THE JURISDICTION.**—The rule that a judgment should not be reversed for errors not affecting a substantial right, does not apply to irregularities that go to the jurisdiction of the Court. *Id.*
13. **PETITION FOR ALTERATION OF ROAD—WHAT MUST CONTAIN.**—A petition for the alteration of a road that does not describe the terminal points with certainty, is insufficient to give the County Court jurisdiction. *Id.*
14. **JURISDICTION TO ASCERTAIN BOUNDARIES OF LAND.**—The locality at which a lost stake was set may be ascertained as well in a court of law as by a suit in equity. *Lewis v. Lewis*, 177.

15. **COUNTY COURT.**—The County Court is practically and essentially a court of special and limited jurisdiction. *State v. Officer*, 180.
16. **WHAT RECORD SHOULD SHOW.**—The record of the County Court should show affirmatively that it had jurisdiction of the person and subject-matter affected by its proceedings. *Id.*
17. **WHAT RECORD INSUFFICIENT.**—A record of the County Court, made in the matter of the location of a county road, which reads, "The bond and proof of posting notices having been made to the satisfaction of the Court," etc., is insufficient to show that the Court had acquired jurisdiction of the persons of parties whose rights might be affected by the location of such road. *Id.*
18. **POWER OF THE LEGISLATURE.**—The Legislature had the power to confer upon the Police Judge of the city of Portland the jurisdiction and authority of a Justice of the Peace within the limits of said city, but it had no power to limit that jurisdiction to criminal cases. *State v. Wiley*, 185.
19. **JURISDICTION OF POLICE JUDGE WHEN ACTING AS A JUSTICE.**—The jurisdiction and authority of the Police Judge, when acting as a Justice of the Peace, are identical with that of all other Justices of the Peace, and extend alike to civil and criminal cases. *Id.*
20. **CHARGE NEED NOT BE IN WRITING.**—Where a defendant is brought before a committing magistrate on a charge of felony, it is not essential to the jurisdiction that the charge should be in writing. *Hannah v. Wells*, 249.
21. **COURT OF EQUITY WILL INTERPOSE, WHEN.**—Mere mental weakness, or inadequacy of consideration standing alone, will not warrant the interference of a Court of equity in ordinary cases; but where both these elements are present, equity will take jurisdiction. *Scovill v. Barney*, 238.
22. **COUNTY COURTS.**—The Constitution of this State provides that County Courts shall be courts of record having general jurisdiction, to be defined and limited by law; and the Legislature having given them exclusive and original jurisdiction in all matters pertaining to Probate Courts: *Held*, that County Courts, in exercising judicial powers in such business, should be regarded as courts of general and superior jurisdiction. *Tustin v. Gaunt*, 305.
23. **WHEN WANT OF JURISDICTION WILL APPEAR.**—When the record recites what was done, and the facts so recited are not sufficient to give the Court jurisdiction, a want of jurisdiction will appear upon the face upon the record. *Id.*
24. **WHEN WANT OF, APPEARS.**—When want of jurisdiction appears, it is the duty of the Court at any stage of the proceeding, on its own motion, to refuse to proceed further. *Evans v. Christian*, 375.

See MUNICIPAL CORPORATION, 1.

JURY.

1. **JURY ARE PRESUMED TO FIND.**—The jury are presumed to find every material allegation in the complaint in favor of the plaintiff, where a general verdict has been rendered in his favor in the Court below. *Torrence v. Strong*, 39.

2. **INSTRUCTIONS.**—In an action against a sheriff for failing and refusing to levy upon property sold by the judgment-debtor prior to the execution, and remaining in his possession, the Court instructed the jury that the title to the property so sold was in the judgment-debtor, and that such property was subject to the execution: *Held*, that the instruction was error. It should have been left to the determination of the jury whether the sale was made in good faith or not. *Moore v. Floyd et al.*, 101.

JUSTICE'S COURT.

See **LIEN**, 1.

LANDS.

See **DESCENT**.

LEGISLATURE.

1. **LEGISLATIVE POWER, DELEGATION OF.**—The Legislature cannot delegate the power to legislate, unless it be in the specified exceptional case of creating municipal corporations. *Brown v. Fleischer (per Upton, J., dissenting)*, 132.
2. **POWER OF THE LEGISLATURE.**—The Legislature had the power to confer upon the Police Judge of the city of Portland the jurisdiction and authority of a Justice of the Peace within the limits of said city, but it had no power to limit that jurisdiction to criminal cases. *State v. Wiley*, 184.

LIABILITY.

See **EMPLOYER; EMPLOYEE**.

LIEN.

1. **JUDGMENT IN JUSTICE'S COURT MAY BECOME A LIEN, HOW.**—Where a judgment was obtained before a Justice of the Peace for more than ten dollars, exclusive of cost, under the statutes of 1855, it was necessary to file a *certified transcript* of such judgment in the office of the Clerk of the District Court in the county where the judgment was rendered, in order to acquire a judgment-lien upon real estate. Filing a *mere abstract* of such judgment is a failure to meet the requirements of the statute. *Dearborn v. Patton et al.*, 58.
2. **MECHANIC'S LIEN ASSIGNABLE.**—Although the right to perfect a lien by filing notice, under the Act concerning liens of mechanics, is a privilege to be exercised by the person performing the labor or furnishing the materials, when the lien is perfected it is assignable. *Brown v. Harper*, 89.
3. **MECHANIC'S LIEN.**—When judgment is rendered to enforce a mechanic's lien, an execution may be issued thereon to sell the premises. *Kendall v. McFarland*, 293.
4. **IDEM.**—Under the statute mechanics' liens have precedence over all other liens after the commencement of the building; but the statute must be strictly complied with in order to secure such precedence. *Id.*

5. *IDEM*.—In an action to enforce such liens it should appear when the building was commenced, to enable the Court to determine when the liens attached. *Id*.
6. *IDEM*.—If it nowhere appears in the judgment-roll when the liens attached to the building, the judgment would operate as a lien upon the premises as an ordinary judgment from the time it was docketed. *Id*.

LIMITATIONS.

1. *STATUTE OF LIMITATIONS*.—A payment by an attorney of the principal or interest on demands collected by him for his client prevents the operation of the Statute of Limitations to bar the client's right of action against such attorney for collections retained by him. *Torrence v. Strong*, 39.
2. *ABSENCE OF MORTGAGOR FROM THE STATE*.—The absence of a mortgagor from the State will not prevent the Statute of Limitations from running on the mortgagee's right to foreclose. Equity acts by analogy to the rules of law. A suit of foreclosure is in effect a proceeding *in rem*. There is no analogy in the application of the Statute of Limitations between such a proceeding and actions at law. *Anderson v. Baxter*, 105.
3. *PAYMENT—WHAT IS, TO TAKE A SUIT OUT OF THE STATUTE OF LIMITATIONS*.—A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off or counter-claim, which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the Statute of Limitations from running. *Id*.
4. *MORTGAGE*.—The defendant and her co-obligor executed a mortgage to secure payment of their joint note, and suit was commenced to foreclose the mortgage more than ten years after the note fell due; within the ten years part payment had been made on the note by the administrator of the defendant's co-obligor: *Held*, that the suit was not barred by the Statute of Limitations. *Sutherland v. Roberts*, 378.
5. *IDEM*.—By § 25 of the Civil Code, the fact of part payment is made the test for ascertaining whether the action or suit is barred by the Statute of Limitations, and if it is not barred, the action may be founded on the original promise. *Id*.
6. *IDEM—WHO MAY MAKE PAYMENT TO TAKE CASE OUT OF STATUTE*.—Where part payment is made upon an existing contract of the kind specified in § 25, the creditor retains the right to sue on the original contract, without regard to the theory of a new promise, during the period prescribed, counting from the time of payment, and any person who could be compelled to pay is competent to make the payment. *Id*.

LIS PENDENS.

SUIT FOR PARTITION.—To bind innocent purchasers for a valuable consideration by the proceedings in the suit for partition, under the doctrine of *lis pendens*, the cause should be prosecuted with reasonable dispatch. A suspension of proceedings for more than five years would be an unreasonable delay. *Bybee v. Summers*, 354.

MACHINERY.

DEFECTS IN—WHEN EMPLOYER LIABLE FOR.—An employer who provides machinery and controls its operations, must see that it is suitable; and if an injury to the workmen happen by reason of defect *unknown* to the latter, and which the employer by use of ordinary care could have cured, such employer is liable for the injury. *Stone v. Oregon City Mfg. Co.*, 52.

MANDAMUS.

1. **WRIT OF, IS THE PROPER REMEDY, WHEN.**—The writ of mandamus is the proper remedy to compel the incumbent of an office to deliver to his successor the appurtenances, etc., thereof. *Warner v. Myers*, 72.
2. **IDEM.**—The proceeding under the writ cannot be used as a means of determining the ultimate rights of the parties to the office. *Id.*
3. **WHAT MAY BE INQUIRED INTO UNDER THE WRIT.**—The principal fact to be ascertained is, to whom did the Board of Canvassers award the certificate of election? It being the duty of the Board to determine this question in the first instance, the correctness of its decision cannot be inquired into in this form of proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed or set aside by a competent tribunal and in a proceeding where its correctness may be inquired into. *Id.*

MARRIED WOMEN.

1. **REAL PROPERTY OF MARRIED WOMEN—SPECIFIC PERFORMANCE AGAINST.**—A specific performance will not be decreed by a Court of equity to compel a married woman to convey her real property upon a contract or covenant executed by her and her husband for that purpose during coverture. *Frarey v. Wheeler et al.*, 190.
2. **IDEM.**—But where a married woman, during coverture, joins with her husband in a covenant to convey her real property, and the covenantee advances money to the wife on the contract, or, with her assent, enters into the possession of the premises, and makes permanent improvements thereon, the money so advanced, and the value of such improvements (less the value of the use of such premises), will be decreed to be a charge upon such land until paid. Courts in protecting the rights of married women should not go so far as to encourage the perpetration of fraud by them. *Id.*
3. **DONATION LAW—RIGHTS OF MARRIED WOMEN UNDER.**—L. took up two hundred and sixty-three and fifty-three one hundredths acres of land under § 4 of the Donation Law, and, being married at the time, held that his wife was entitled to have one-half thereof set apart to her. The right of the wife in no way depends upon the number of acres in the claim. *Jette v. Picard*, 296.

MAYHEM.

WHAT MAY BE DENOMINATED MAYHEM.—Any offense made punishable by § 527 of the Criminal Code may be denominated mayhem in indictments. *State v. Vowels*, 324.

MECHANIC.

1. LIEN OF, ASSIGNABLE.—Although the right to perfect a lien by filing notice, under the Act concerning liens of mechanics, is a privilege to be exercised by the person performing the labor or furnishing the materials, when the lien is perfected it is assignable. *Brown v. Harper et al.*, 89.
2. MECHANIC'S LIEN.—When judgment is rendered to enforce a mechanic's lien, an execution may be issued thereon to sell the premises. *Kendall v. McFarland*, 293.
3. IDEM.—Under the statute, mechanics' liens have precedence over all other liens after the commencement of the building; but the statute must be strictly complied with in order to secure such precedence. *Id.*
4. IDEM.—In an action to enforce such liens it should appear when the building was commenced, to enable the Court to determine when the liens attached. *Id.*
5. IDEM.—If it nowhere appears in the judgment-roll when the liens attached to the building, the judgment would operate as a lien upon the premises as an ordinary judgment from the time it was docketed. *Id.*

MINOR.

LIABILITY OF A PARENT ON CONTRACTS OF HIS MINOR CHILD.—In general a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority is proved, or the circumstances be sufficient to imply one. *Carney v. Barrett*, 171.

MISTAKE.

EVIDENCE.—Unless the evidence shows the alleged mistake clearly and satisfactorily, it is not sufficient to establish cause for the correction of a deed. *Lewis v. Lewis*, 177.

MORTGAGE.

1. SUIT TO FORECLOSE IS NOT FOR THE DETERMINATION OF ANY RIGHT OR CLAIM TO OR INTEREST IN REAL PROPERTY.—A suit to foreclose a mortgage is not for the determination of any right or claim to or interest in real property, within the meaning of § 378 of the Civil Code. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it. *Anderson v. Baxter*, 105.
2. STATUTE OF LIMITATIONS.—The absence of a mortgagor from the State will not prevent the Statute of Limitations from running on the mortgagee's right to foreclose. Equity acts by analogy to the rules of law. A suit of foreclosure is in effect a proceeding *in rem*. There is no analogy in the application of the Statute of Limitations between such a proceeding and actions at law. *Id.*
3. EFFECT OF POSSESSION.—A mortgagee or his assignee in possession occupies a position, in a suit to foreclose, no more favorable than if out of possession. *Id.*
4. POSSESSION OF MORTGAGEE.—A mortgagee who obtains possession of mortgaged premises with the assent of the mortgagor, after default of the

latter, may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor so long as the mortgage debt remains unpaid. *Roberts v. Sutherland*, 219.

See ASSIGNMENT, 2.

MOTION.

WHEN DEFENSE MAY BE STRICKEN OUT.—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on motion. *Torrence v. Strong*, 39.

MUNICIPAL CORPORATION.

1. **JURISDICTION OF MUNICIPAL CORPORATIONS TO TRY QUESTIONS OF CONTEST FOR MUNICIPAL OFFICE.**—The city of Corvallis is not invested by its charter with authority to hear and determine a contest for a city office. The right to try a contest for a municipal office does not follow by necessary implication from the right to provide for the election of city officers. Neither does such right follow from the general authority to provide by laws and ordinances, not inconsistent with the laws of the United States or of this State, to carry into effect the provisions of its charter. *Robertson v. Groves et al.*, 210.
2. **CONSTRUCTION.**—The statutes creating municipal corporations are to be strictly construed against such corporation. *Id.*

NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE.—A person employed to work with or around dangerous machinery, is bound to exercise his thinking faculties and give careful attention as to how he passes around it; and if he fail to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury. *Stone v. Oregon City Mfg. Co.*, 52.

NOTICE.

1. **PROOF OF, IN LOCATING ROADS.**—The County Court has no power to lay out roads until the petition and proof of notice prescribed by statute are presented. *Johns v. Marion County*, 46.
2. **APPEAL FROM A DECREE.**—The notice of appeal from a decree need not specify the grounds of error. *Lewis v. Lewis*, 209.
3. **ATTENTION OF PURCHASER.**—Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, operates as notice. *Bohlman v. Coffin*, 313.
4. **IDEM.**—Actual and unequivocal possession is notice. *Id.*
5. **IMPLIED NOTICE.**—Notice should, with rare exceptions, be implied where one is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man. *Carter v. The City of Portland*, 340.

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OFFICE.

1. **MANDAMUS.**—The writ of mandamus is the proper remedy to compel the incumbent of an office to deliver to his successor the appurtenances, etc., thereof. *Warner v. Myers*, 72.
2. **IDEM.**—The proceeding under the writ cannot be used as a means of determining the ultimate rights of the parties to the office. *Id.*
3. **WHAT MAY BE INQUIRED INTO UNDER THE WRIT.**—The principal fact to be ascertained is, to whom did the Board of Canvassers award the certificate of election? It being the duty of the Board to determine this question in the first instance, the correctness of its decision cannot be inquired into in this form of proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed or set aside by a competent tribunal and in a proceeding where its correctness may be inquired into. *Id.*
4. **JURISDICTION OF MUNICIPAL CORPORATIONS TO TRY QUESTIONS OF CONTEST FOR MUNICIPAL OFFICE.**—The city of Corvallis is not invested by its charter with authority to hear and determine a contest for a city office. The right to try a contest for a municipal office does not follow by necessary implication from the right to provide for the election of city officers. Neither does such right follow from the general authority to provide by-laws and ordinances, not inconsistent with the laws of the United States or of this State, to carry into effect the provisions of its charter. *Robertson v. Groves et al.*, 210.

ONUS PROBANDI.

See **BURDEN OF PROOF.**

ORDER.

CONFIRMING SHERIFF'S SALE.—An order of Court, confirming a sheriff's sale on execution, may be regarded as a final adjudication touching the regularity of all proceedings taken in the execution of final process. *Matheus v. Eddy*, 225.

See **INTERLOCUTORY ORDER**, 1.

PARENT.

LIABILITY OF A PARENT ON CONTRACTS OF HIS MINOR CHILD.—In general a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority is proved, or the circumstances be sufficient to imply one. *Carney v. Barrett*, 171.

PARTIES TO ACTION.

1. **ADMINISTRATOR—AUTHORITY TO SUE.**—An administrator has no authority to institute a suit to set aside a conveyance of real estate made by his decedent in his lifetime, without leave first had and obtained from the County Court or Judge thereof. *King v. Boyd*, 326.
2. **IDEM—RIGHT TO POSSESSION OF REAL ESTATE OF DECEDENT.**—The right of an administrator to the possession of the real estate of his decedent is temporary, and is limited to the purposes of administration. It would

be an unsafe rule to allow an administrator of an estate upon his own motion and without any showing of a necessity therefor, for the purposes of administration, to engage in litigation concerning the title to the realty of an estate. In such cases the heirs at law are the real parties in interest, and should be allowed to control such litigation. *Id.*

PARTITION.

1. **INTERLOCUTORY ORDER.**—In a suit for partition of real estate, the order or decree of the Court directing the partition or the sale of the premises without further proceedings, is not a final decree, but only an interlocutory order, and is not notice to parties and their privies, etc., under the provisions of § 15, p. 154, of the Statutes of 1855. *Bybee v. Summers*, 354.
2. **LIS PENDENS.**—To bind innocent purchasers for a valuable consideration by the proceedings in the suit for partition, under the doctrine of *lis pendens*, the cause should be prosecuted with reasonable dispatch. A suspension of proceedings for more than five years would be an unreasonable delay. *Id.*

PAYMENT.

1. **STATUTE OF LIMITATIONS.**—A payment by an attorney of the principal or interest on demands collected by him for his client prevents the operation of the Statute of Limitations to bar the client's right of action against such attorney for collections retained by him. *Torrence v. Strong*, 39.
2. **WHAT IS, TO TAKE A SUIT OUT OF THE STATUTE OF LIMITATIONS.**—A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off or counter-claim, which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the Statute of Limitations from running. *Anderson v. Baxter*, 105.
3. **WHO MAY MAKE PAYMENT TO TAKE CASE OUT OF STATUTE.**—Where part payment is made upon an existing contract of the kind specified in § 25 (Civil Code) the creditor retains the right to sue on the original contract, without regard to the theory of a new promise, during the period prescribed, counting from the time of payment, and any person who could be compelled to pay is competent to make the payment. *Sutherland v. Roberts*, 378.

PETITION.

1. **ROADS.**—The County Court has no power to locate roads until the petition and proof of notice, prescribed by statute, is presented. *Johns v. Marion County*, 46.
2. **MUST DESCRIBE TERMINAL POINTS.**—A petition for the alteration of a road that does not describe the terminal points with certainty, is insufficient to give the County Court jurisdiction. *Id.*

PLEADING.

1. **FALSE DEFENSE.**—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on motion. *Torrence v. Strong*, 39.

2. **SUFFICIENT ANSWER.**—If an answer puts in issue the material facts it is sufficient. *Foren v. Dealey*, 92.
3. **STRIKING OUT AN ANSWER.**—To justify striking out an answer as false and therefore sham, it must be obviously false or false in fact and pleaded in bad faith. *Id.*
4. **SHAM ANSWERS.**—Sham answers are such as are good in form, but false in fact and pleaded in bad faith. *Id.*
5. **VAGUENESS IN PLEADING.**—Mere vagueness in pleading must be corrected by amendment and not visited by judgment. *Id.*
6. **SUFFICIENCY OF A DENIAL.**—Where in an action for the recovery of damages, the defendant pleads accord and satisfaction, and the replication denies that "in consideration of the payment of seventy-five dollars, or any other sum and the surgeon's fee," mentioned in the answer, the plaintiffs "accepted the same in full satisfaction and discharge of the damages," etc.: *Held*, that while this is an admission of the payments, it is a denial of their acceptance in discharge of the damages claimed, and, therefore, a sufficient denial of the settlement set up in the answer. *O'Riley v. Wilson*, 96.
7. **DENIALS OF VALUE.**—A denial that property sued for is of the exact value alleged in the complaint is an admission of any less value. *Scovill v. Barney*, 288.
8. **IDEM—CONJUNCTIVE DENIALS.**—Facts stated conjunctively in a complaint should not be denied in the answer as a whole, as conjunctively stated, but should be disjunctively denied in order to raise an issue. *Id.*
9. **PROOF CANNOT ADD TO, WHEN.**—Proof cannot add to the force of an undisputed allegation of the pleading, where the pleading points out a particular mode of service; if the mode pointed out falls short of due service, proofs cannot aid the allegation. *Heatherly et al. v. Hadley et al.*, 1.
10. **SUITORS MAY PRESENT ANY CAUSE OF SUIT.**—The Code by dispensing with the classification of bills, has not taken away the right of suitors to present any cause of suit that formerly could be presented by any form of bill. *Id.*
11. **AMENDING PLEADINGS.**—Discretion in regard to amending pleadings is in the Circuit Court. *Bamford v. Bamford et al.*, 30.

See COMPLAINT, 2, 3.

POLICE JUDGE.

1. **POWER OF LEGISLATURE TO LIMIT THE JURISDICTION OF.**—The Legislature had the power to confer upon the Police Judge of the city of Portland the jurisdiction of a Justice of the Peace within said city, but it had no power to limit that jurisdiction to criminal cases. *State v. Wiley*, 184.
2. **JURISDICTION OF POLICE JUDGE WHEN ACTING AS A JUSTICE.**—The jurisdiction and authority of the Police Judge, when acting as a Justice of the Peace, are identical with that of all other Justices of the Peace, and extend alike to civil and criminal cases. *Id.*

POSSESSION.

1. **EFFECT OF, BY MORTGAGEE.**—A mortgagee or his assignee in possession occupies a position, in a suit to foreclose, no more favorable than if out of possession. *Anderson v. Baxter*, 105.
2. **MORTGAGEE IN POSSESSION.**—A mortgagee who obtains possession of mortgaged premises with the assent of the mortgagor, after default of the latter, may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor so long as the mortgage debt remains unpaid. *Roberts v. Sutherland*, 219.
3. **NOTICE.**—Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, operates as notice. *Bohlman v. Coffin*, 313.
4. **IDEM.**—Actual and unequivocal possession is notice. *Id.*

See ADMINISTRATOR, 2.

PRACTICE.

1. **ISSUES CONCERNING PROPERTY IN A SUIT FOR DIVORCE.**—Although a Court may first pass upon the question of granting or denying the divorce and afterwards investigate and determine the issues concerning property, the subsequent investigation must be had in the same suit. *Bamford v. Bamford et al.*, 30.
2. **CAUSE OF SUIT UNDER THE CODE.**—Although the classification of bills has been dispensed with by the Code, yet suitors may present any cause of suit that formerly could be presented by any form of bill. *Heatherly et al. v. Hadley et al.*, 1.
3. **PROOF CANNOT AID AN ALLEGATION OF SERVICE.**—Where the pleading points out a particular mode of service, if the mode pointed out falls short of due service, proofs cannot aid the allegation. *Id.*
4. **LEAVE TO PERFECT APPEAL.**—It is too late to apply for leave to perfect the appeal after the motion to dismiss is brought on for hearing. *Cross v. Chichester*, 114.
5. **AFFIDAVITS SHOULD BE FILED, WHEN.**—Affidavits to be read in support of the cross motion should be filed before the motion is brought on for hearing. *Id.*
6. **COST-BILL.**—In taxing costs the practice requires a cost-bill or statement of disbursements, which must state the items separately, specifying the amount of each item and for what the expense is incurred, and it must be verified. *Id.*
7. **IDEM—VERIFICATION.**—Such verification is sufficient, if the party deposes that the items of the bill or statement are correct as the deponent verily believes, and that the liability has been necessarily incurred. *Id.*
8. **OBJECTION TO COST-BILL.**—The written objection to the bill need not be on oath, but it must point out particularly the errors in the bill. *Id.*
9. **RECEIVING VERDICT.**—It is error to receive the verdict of a jury in the absence of the defendant where the crime charged is a felony. *State v. Spores*, 198.

10. **EXTRINSIC EVIDENCE IN AID OF THE RECORD.**—When extrinsic evidence is admitted in aid of the record, the fact permitted to be proved in a subsequent proceeding is not solely that process was in fact served, but that there was proof of service before the Court that rendered the decree. *Heatherly et al. v. Hadley et al.*, 2.
11. **DEFENSE—WHEN CANNOT BE DEMURRED TO.**—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on motion. *Torrence v. Strong*, 39.

See VERDICT.

PRE-EMPTION.

COUNTIES CANNOT PRE-EMPT LAND IN THIS STATE UNDER THE ACT OF CONGRESS OF MAY 26TH, 1824.—The Act of Congress of May 26th, 1824, "granting to the counties or parishes of each State or Territory of the United States, in which the public lands are situated, the right of pre-emption to a quarter section of land for seats of justice in the same," was never in force in this State. Neither was the Town-site Act of May 23d, 1844, in force in this State prior to July 14th, 1854. *Whitlow v. Reese*, 335.

PRESUMPTION.

1. **JURY ARE PRESUMED TO FIND.**—The jury are presumed to find every material allegation in the complaint in favor of the plaintiff where a general verdict has been rendered in his favor in the court below. *Torrence v. Strong*, 39.
2. **EVIDENCE PRESUMED.**—The law will presume there was evidence to support a finding unless the contrary affirmatively appears. *Fulton v. Earhart*, 62.
3. **WHEN OFFICER HAS FAILED TO LEVY.**—When a sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded in the writ, it will be presumed that the plaintiff in the execution has suffered the loss of his debt, until the contrary is shown by the officer, upon whom the burden of proof rests. *Moore v. Floyd*, 101.
4. **STATE TREASURER IS PRESUMED TO KNOW WHAT APPROPRIATIONS HAVE BEEN MADE.**—The State Treasurer is presumed to know what appropriations have been made, and he has no right to pay warrants unless drawn upon some specific fund, except when a claim is authorized by law to be paid out of a general contingent appropriation, he may pay the same upon the warrant of the Secretary. *Brown v. Fleischer*, 132.
5. **COUNTY COURTS.**—Whenever the proceedings and judgments of County Courts come in question collaterally, they are entitled to all the legal presumptions pertaining to the records of Courts of superior jurisdiction. *Tustin v. Gaunt*, 305.
6. **PROCEEDINGS IN COUNTY COURT—HOW IMPEACHED.**—The proceedings and judgments of County Courts in probate matters import absolute verity, and whenever they come in question collaterally cannot be impeached by evidence *alunde* the record; but may be impeached by evidence appearing upon the face of the record showing a want of jurisdiction in the Court. *Id.*

7. **WHEN THE RECORD IS SILENT.**—Legal presumptions do not come to the aid of the record, except as to facts touching which the record is silent. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done. If appellant was a minor, and had no guardian when the order of sale was made, it was the duty of the Court to appoint one before making such order; but the record being silent, the law presumes the Court did its duty. No evidence *altunde* the record will be admitted to impeach the proceedings and orders of a Court of general and superior jurisdiction. *Id.*
8. **EVERY KILLING OF A HUMAN BEING IS PRESUMED TO BE UNLAWFUL.**—Every killing of a human being is presumed to be unlawful. The words "shooting and killing" describe a crime generally, and, in an undertaking, in a criminal proceeding, are a sufficient description of the crime charged to create a liability against the sureties thereon. *Hannah v. Wells (per McArthur, J., dissenting)*, 249.

PRIVATE CORPORATIONS.

See CORPORATIONS, 1, 2, 3, 4.

PROOF.

1. **CANNOT ADD TO AN UNDISPUTED ALLEGATION.**—Proof cannot add to the force of an undisputed allegation of the pleading. *Heatherly et al. v. Hadley et al.*, 1.
2. **PROOF OF SERVICE—WHERE MADE.**—Proof of service must be made in the Court in which the process is returnable. *Id.*
3. **EXTRINSIC EVIDENCE IN AID OF THE RECORD.**—When extrinsic evidence is admitted in aid of the record, the fact permitted to be proved in a subsequent proceeding is not solely that process was in fact served, but that there was proof of service before the Court that rendered the decree. *Id.*
4. **BURDEN OF PROOF.**—When a sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded in the writ, it will be presumed that the plaintiff in the execution has suffered the loss of his debt, until the contrary is shown by the officer, upon whom the burden of proof rests. *Moore v. Floyd*, 101.
5. **BURDEN OF PROOF.**—In an action to recover real estate, where plaintiffs allege title in themselves, and this allegation is denied in the answer of the defendant, the *onus probandi* is upon the plaintiffs to show title in themselves. *Farley v. Parker*, 269.

PROPERTY.

1. **NOT AFFECTED BY A DECREE OF DIVORCE, WHEN.**—Where the complaint in a suit for divorce contains no allegations concerning property, and the decree is silent on the subject, the party at whose prayer the decree is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree. *Bamford v. Bamford et al.*, 30.
2. **ISSUES CONCERNING, IN DIVORCE SUIT.**—Although a Court may first pass upon the question of granting or denying the divorce and afterwards in-

investigate and determine the issues concerning property, the subsequent investigation must be had in the same suit. *Id.*

PURCHASER.

1. **AT SALE OF DISQUALIFIED ADMINISTRATOR.**—One who purchases land at a sale by an administrator who has been thus disqualified, without knowledge of his disqualification, will be entitled to relief in equity. *Levy v. Riley*, 392.
2. **APPEAL—RIGHT OF BY PURCHASER AT ADMINISTRATOR'S SALE.**—A purchaser under an order of the County Court to sell land of a decedent, has no right of appeal from such order, although it should be obtained by an improper party, unless such purchaser should be (an heir or devisee of such decedent) a party required by statute to be made a party to such proceeding; neither has such purchaser any right of appeal under the statute from an order of confirmation of such sale. *Id.*

REAL PROPERTY.

1. **JUDGMENT-ROLL SHOULD CONTAIN A DESCRIPTION.**—When real property is transferred from one party to another by a decree granting a divorce, the judgment-roll should contain a description of the land transferred. *Bamford v. Bamford et al.*, 30.
2. **MORTGAGE—SUIT TO FORECLOSE IS NOT FOR THE DETERMINATION OF ANY RIGHT OR CLAIM TO OR INTEREST IN REAL PROPERTY.**—A suit to foreclose a mortgage is not for the determination of any right or claim to or interest in real property, within the meaning of § 378 of the Civil Code. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it. *Anderson v. Baxter*, 105.

See **MARRIED WOMEN.**

RECITALS.

See **RECORD.**

RECORD.

1. **RECITAL OF JURISDICTIONAL FACTS.**—If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked collaterally. If the record is silent as to jurisdictional facts, they will be presumed to have been duly established, but such presumption may be rebutted by extrinsic evidence. If it appears by the record expressly, or by necessary implication, that the cause of action was beyond the jurisdiction of the Court, or that the Court proceeded without notice to the parties, no presumption in favor of the jurisdiction arises, and the judgment will be void. *Heatherly et al. v. Hadley et al.*, 1.
2. **A PARTY IS NOT PRECLUDED BY RECITALS IN A DECREE.**—A recital in a decree "that notice has been given in due form of law," will not preclude a party from denying the jurisdiction in a suit brought to reform the decree. When the decree contains a recital that due service was made and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. *Id.*

3. **COUNTY COURT.**—The record of the County Court should show affirmatively that it had jurisdiction of the person and subject-matter affected by its proceedings. *State v. Officer*, 180.
4. **INSUFFICIENT RECORD.**—A record of the County Court, made in the location of a road, which reads, "The bond and proof of posting notices having been made to the *satisfaction* of the Court," etc., is insufficient to show that the Court had acquired jurisdiction of the persons of parties whose rights might be affected by the location of such road. *Id.*
5. **WHEN SILENT.**—Legal presumptions do not come to the aid of the record, except as to facts touching which the record is silent. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done. No evidence *aliunde* the record will be admitted to impeach the proceedings and orders of a Court of general and superior jurisdiction. *Tustin v. Gaunt*, 305.
6. **WHAT CONSTITUTES THE RECORD.**—Under the Code the record includes all the papers and proceedings contained in the judgment-roll. *Id.*
7. **WHEN WANT OF JURISDICTION WILL APPEAR.**—When the record recites what was done, and the facts so recited are not sufficient to give the Court jurisdiction, a want of jurisdiction will appear upon the face upon the record. *Id.*
8. **ERROR DOES NOT APPEAR, WHEN.**—When the record does not show whether or not the mode of making repairs depends on the construction of a written instrument, error does not affirmatively appear from a statement in the record that the Court instructed the jury that the defendant was not obliged to bring soil from elsewhere to repair a ditch conveying water over the plaintiff's land. *Thompson v. Uglow*, 369.

See COUNTY COURT, 2-9.

REFEREE.

1. **CERTIFICATE AND DISCRETION OF REFEREE.**—A referee is an officer of the Court. He is clothed with important powers, and some weight must be given to his certificate, and some discretion allowed him in the manner of taking testimony and returning exhibits. *Bohman v. Coffin*, 313.
2. **IDEM—CERTIFIED COPIES OF EXHIBITS BY.**—When an original instrument is offered in evidence before a referee, and he makes a certified copy thereof and files and returns the certified copy as an exhibit, such exhibit will not be disregarded except in peculiar cases. *Id.*

REPAIRS.

See EASEMENT.

RETURN.

1. **DECREE WILL NOT AID, WHEN.**—When the decree contains a recital that due service was made and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. *Heatherty et al. v. Hadley et al.*, 2.
2. **RETURN FORMS PART OF JUDGMENT-ROLL.**—The return made in obedience to a writ of review forms part of the judgment-roll, and is properly in-

cluded in the transcript without a bill of exceptions. *Johns v. Marion County*, 46.

3. **MUST SHOW JURISDICTION.**—The return should show that the tribunal had jurisdiction. It is a general rule that Courts of limited and general jurisdiction, when exercising a special limited power, conferred by statute, must show affirmatively that jurisdiction has been acquired. *Id.*
4. **NEGLECT OF SHERIFF.**—When a Sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded in the writ, it will be presumed that the plaintiff in the execution has suffered the loss of his debt until the contrary is shown by the officer, upon whom the burden of proof rests. *Moore v. Floyd*, 101.

REVIEW.

1. **RETURN IN OBEDIENCE TO.**—The return made in obedience to a writ of review forms part of the judgment-roll, and is properly included in the transcript without a statement or bill of exceptions.—*Johns v. Marion County*, 46.
2. **REVIEW OF FINDING OF FACT.**—A finding of fact is not open to review simply on a question as to the preponderance of evidence. *Fulton v. Earhart*, 61.
3. **ATTORNEY'S CERTIFICATE.**—The attorney's certificate should not only show that the judgment is erroneous, but in what particular. *Id.*
4. **COSTS.**—The decision of a Circuit Court determining the amount of costs taxable in a case, may be reviewed in the Supreme Court on appeal. *Cross v. Chichester*, 114.
5. **APPEAL.**—Writ of review will not lie where the right of appeal exists. *Evans v. Christian*, 375.
6. **DECISION OVERRULED.**—*Schiroff & Groner v. Phillippi & Coleman* (3 Ogn. 484), overruled so far as it is there held that appeal and review are concurrent remedies. Same case approved so far as it holds that review will lie in a cause (otherwise proper) where the time for appealing has elapsed. *Id.*
7. **OFFICE OF.**—The office of the writ of review is to review the record and proceedings of inferior courts, officers or tribunals acting in a judicial capacity, and in no other. *Burnett v. Douglas County*, 388.
8. **WHAT PROCEEDINGS MAY BE REVIEWED.**—It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. *Id.*
9. **WHEN GRANTING WRIT A MATTER OF DISCRETION.**—When the proceeding sought to be reviewed involves a matter of public interest the allowance of the writ is discretionary. *Id.*

ROADS.

1. **VOID STATUTE.**—Sections 15, 16 and 17 of Chapter 50 of the Miscellaneous Laws of Oregon, authorizing the establishment of private roads over the land of an individual without his consent, for the private use of another, are unconstitutional and void. The Constitution of the State

provides that "private property shall not be taken for *public use* without just compensation," which implies that it cannot be taken for *private use*, whether compensation be made or not. *Wilham v. Osborn*, 318.

2. PRIVATE ROADS CANNOT BE CREATED BY LAW.--If a different class of public roads than is now provided for by statute, is needed for the convenience of persons who are so situated as to have no connection with any public highway, the Legislature may provide for their establishment by providing that they shall be public instead of private roads, and that they may be used by the public. *Id.*

See PETITION, 1, 2.

ROLL.

See JUDGMENT-ROLL, 1-3.

RULES.

COURTS MAY MAKE RULES.--Under our system all Courts have certain powers to be exercised for the purpose of methodically disposing of all cases brought before them. They can establish such rules in relation to the details of the business as shall best serve this purpose, having proper regard for the rights of parties litigant, as guaranteed and recognized by the Constitution and the laws. *Curney v. Barrett*, 171.

SALE.

1. JUDGMENT SALE OF MORTGAGED PREMISES.--Where a judgment was obtained in an action at law upon a promissory note, and a tract of land, which had been mortgaged to secure the note, was sold on the execution without foreclosure of the mortgage, and the sale had been confirmed: *Held*, that the sale is not void, and that it cannot be attacked collaterally. *Mathews v. Eddy*, 225.
2. ORDER CONFIRMING SHERIFF'S SALE.--An order of Court, confirming a Sheriff's sale on execution, may be regarded as a final adjudication touching the regularity of all proceedings taken in the execution of final process. *Id.*

SECRETARY OF STATE.

1. AUTHORITY OF THE SECRETARY OF STATE IN AUDITING CLAIMS AND DRAWING WARRANTS.--The authority of the Secretary of State to audit accounts and draw warrants upon the Treasurer, depends upon the condition that an appropriation has been made by the Legislature for their payment. *Brown v. Fleischer*, 132.
2. AUDITING PUBLIC ACCOUNTS.--The provisions of § 6, p. 622, of the Compiled Laws, requiring the Secretary of State "to examine and determine the claims of all persons against the State, in cases where provisions for the payment thereof shall have been made by law," limits the action of the Secretary to cases where the law provides or enacts that the claimant is entitled to be paid by the State, and not to times when payment can be instantly made. *Brown v. Fleischer* (*per Upton, J., dissenting*), 132.

3. **DUTY OF THE SECRETARY OF STATE.**—It is the duty of the Secretary of State to audit public accounts in every case where the law has clearly provided that the claimant shall be paid by the State; and if the claim is allowed, to draw his warrant for the amount found due. *Id.*

SEIZIN.

GRANTOR, WHEN ESTOPPED.—If the seizin or possession of a particular estate is affirmed in a deed, either in express terms or by necessary implication, the grantor and all persons in privity with him will be estopped from ever afterwards denying such seizin or possession. *Taggart v. Risley*, 235.

SERVICE OF SUMMONS.

1. **PROOF CANNOT AID AN UNDISPUTED ALLEGATION OF.**—Where the pleading points out a particular mode of service, if the mode pointed out falls short of due service, proofs cannot aid the allegation. *Heatherly et al. v. Hadley et al.*, 1.
2. **PROOF OF, WHERE MADE.**—Proof of service must be made in the Court in which the process is returnable. *Id.*
3. **RECITALS OF, IN A DECREE.**—When the decree contains a recital that due service was made, and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. *Id.*
4. **EXTRINSIC EVIDENCE IN AID OF THE RECORD.**—When extrinsic evidence is admitted in aid of the record, the fact permitted to be proved in a subsequent proceeding, is not solely that process was in fact served, but that there was proof of service before the Court that rendered the decree. *Id.*
5. **ADMISSION OF SERVICE.**—An admission of service must state the time and place. *Id.*
6. **WHAT CONSTITUTES DUE SERVICE.**—To be duly served with a summons implies that the defendant has been duly served with a summons, notifying him to appear and answer in the Court where the judgment is sought to be taken. *Smith et al. v. Ellendale Mill Co.*, 70.

SHERIFF'S SALE.

See **SALE**, 2.

SOCIETIES.

1. **UNINCORPORATED SOCIETIES MAY BECOME BENEFICIARIES OF A SPECIFIC TRUST.**—Unincorporated societies, created for religious or benevolent purposes, when organized so as to entitle them to become incorporated under the laws of the State, are capable of becoming the beneficiaries of a specific trust created for their benefit, and our Courts will, in the exercise of a chancery jurisdiction, enforce such trusts. *Trustees M. E. Church v. Adams*, 76.
2. **TRUSTEES OF SUCH SOCIETIES MAY SUE.**—The trustees and agents of such societies have legal capacity to sue, when the suit is brought for the benefit of the association. *Id.*

SPECIFIC PERFORMANCE.

1. **REAL PROPERTY OF MARRIED WOMEN—SPECIFIC PERFORMANCE AGAINST.**—A specific performance will not be decreed by a Court of equity to compel a married woman to convey her real property upon a contract or covenant executed by her and her husband for that purpose during coverture. *Frarey v. Wheeler et al.*, 190.
2. **IDEM.**—But where a married woman, during coverture, joins with her husband in a covenant to convey her real property, and the covenantee advances money to the wife on the contract, or, with her assent, enters into the possession of the premises, and makes permanent improvements thereon, the money so advanced, and the value of such improvements (less the value of the use of such premises), will be decreed to be a charge upon such land until paid. Courts in protecting the rights of married women should not go so far as to encourage the perpetration of fraud by them. *Id.*

STATUTE.

1. **CONSTRUCTION OF.**—A statute repealing or in anywise modifying the remedy of a party by action or suit, should not be construed to affect actions or suits brought before the repeal or modification. *Newsom v. Greenwood*, 119.
2. **AMENDMENT OF—APPROPRIATION ACT.**—Provisions in a General Appropriation Act cannot operate to transfer the power of auditing claims from one officer to another. Nor can the statute that provides the mode of auditing public accounts be revised and amended by a joint resolution, or by provisos in a General Appropriation Act. *Brown v. Fleischer (per Upton, J., dissenting)*, 132.
3. **FUND.**—Every law that imposes or authorizes a tax must create a fund, unless a fund already exists, into which the tax is to be paid. *Id.*
4. **IDEM.**—When a statute provides that the State shall pay for particular services, if there is no special requirement that the claim shall be paid out of a particular or special fund, it will be payable out of the general fund. *Id.*
5. **VOID PROVISIONS IN STATUTE—EFFECT OF.**—When some of the provisions of a statute are constitutional and others unconstitutional, the latter only are void. *State v. Wiley*, 185.

See CONSTRUCTION, 1-6; LIMITATIONS, 1, 2.

STATUTES CONSTRUED.

1. **DRAINING LANDS.**—The Act of 1868, to facilitate the draining of lands in certain cases. *Seely v. Sebastian et al.*, 25.
2. **LIEN OF JUDGMENT OF JUSTICE'S COURT.**—The Act of 1855, providing that upon filing a certified transcript of a judgment rendered in Justice's Court, in the office of the Clerk of the District Court, such judgment becomes a lien upon the real property of the judgment debtor. *Dearborn v. Patton et al.*, 58.
3. **ASSESSMENTS.**—The language "indebtedness within this State," in the Act of December 19, 1865, relating to the duties of assessors, has reference to

the *locus in quo* of the creditor, rather than the place of the payment of the debt. *Ankeny v. Multnomah County*, 271.

4. **DONATION ACT.**—The Act of Congress of September 27, 1850, operated in favor of the actual settler, who was under no disability, as a present grant. *Blakeley v. Caywood*, 279.
5. **VOID STATUTE.**—Sections 15, 16, and 17 of Chapter 50 of the Miscellaneous Laws of Oregon, authorizing the establishment of private roads over the land of an individual without his consent, for the private use of another, are unconstitutional and void. The Constitution of the State provides that "private property shall not be taken for *public use* without just compensation," which implies that it cannot be taken for *private use*, whether compensation be made or not. *Witham v. Osborn*, 318.

See LIMITATIONS.

STOCKHOLDER

See ASSESSMENTS, 1-4.

SUIT.

See ACTION, 1, 2; PARTITION, 1, 2.

SUMMONS.

WHAT CONSTITUTES DUE SERVICE.—To be duly served with a summons implies that the defendant has been duly served with a summons, *notifying him to appear and answer in the Court where the judgment is sought to be taken*. *Smith et al. v. Ellendale Mill Co.*, 70.

See SERVICE OF SUMMONS.

SURETY.

STATEMENT OF CRIME CHARGED IN AN UNDERTAKING ON ARREST.—It is not necessary, in order to create a liability against the sureties on an undertaking on arrest for crime, that the crime for which the person is admitted to bail should be set forth or described in the undertaking of bail with the same exactness that is required in an indictment or commitment. It is sufficient if the crime is referred to in general terms. *Hannah v. Wells* (*per McArthur, J., dissenting*), 249.

TAXABLE PROPERTY.

INDEBTED WITHIN THE STATE—WHAT CONSTITUTES, WITHIN THE MEANING OF THE STATUTE.—That part of the Act of December 19, 1865, which declares, "It shall be the duty of the Assessor to deduct the amount of indebtedness within this State, of any person assessed, from the amount of his or her taxable property, given under oath," construed. *Held*, 1. That there is an ambiguity in the language of the Act requiring judicial construction; 2. That the language "indebtedness within this State," has reference to the *locus in quo* of the creditor, rather than the place of the payment of the debt; 3. That although the debt sought to be deducted from the value of taxable property may have been contracted and made payable within this State, and although the creditor, at the

time the debt was contracted, resided therein, yet if, at the time of the assessment, the creditor is a non-resident of the State, the indebtedness cannot be deducted. *Ankeny v. Multnomah County*, 271.

TREATS.

EVIDENCE OF TREATS.—In a trial for murder where the defense is justifiable homicide, it is competent to prove the language and conduct of deceased towards defendant some days prior to the killing; the testimony showing that defendant was in fear of deceased at such time, and tending to show that he was in imminent peril of an attack from deceased at the time of the killing. *State v. Dodson*, 64.

TITLE.

1. **DEED CONVEYS AFTER-ACQUIRED TITLE, WHEN.**—If the terms of a deed clearly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty. *Taggart v. Ritsley*, 235.
2. **IDEM.**—Where a grantor covenants to warrant the premises against all persons claiming by, through or under himself, and he subsequently acquires the legal title to the premises, that legal title will inure to the benefit of the grantee. *Id.*
3. **THE DONATION ACT IS A PRESENT GRANT.**—The language of the Donation Act of September 27, 1850, operated in favor of the actual settler, who was under no disability, as a present grant, and vested in the donee a legal title to the land before the issuing of the patent. *Blakeley v. Caywood*, 279.
4. **IDEM—DONEE TAKES UPON CONDITIONS SUBSEQUENT.**—By the operation of the Donation Act the donee acquires the land in fee subject to the conditions specified in the Act. They are conditions subsequent, and it is in the power of the donee to render the estate absolute by performance of the conditions. *Id.*
5. **IDEM—GRANT IS NOT VOID WHERE ALIEN DIES BEFORE NATURALIZATION.**—The proviso in the fourth section of the Act that no alien shall be entitled to patent until he becomes naturalized does not render the grant void upon the death of such alien without naturalization. *Id.*

TRANSCRIPT.

1. **RETURN TO WRIT OF REVIEW.**—The return made in obedience to a writ of review forms part of the judgment-roll, and is properly included in the transcript, without a statement or bill of exceptions. *Johns v. Marion County*, 46.
2. **FILING TRANSCRIPT OF JUDGMENT.**—Where a judgment was obtained before a Justice of the Peace for more than ten dollars, exclusive of cost, under the statutes of 1855, it was necessary to file a *certified transcript* of such judgment in the office of the Clerk of the District Court in the county where the judgment was rendered, in order to acquire a judg-

ment-lien upon real estate. Filing a *mere abstract* of such judgment is a failure to meet the requirements of the statute. *Deurborn v. Patton et al.*, 58.

TREASURER.

STATE TREASURER—WHAT WARRANTS MAY BE PAID BY.—The State Treasurer is presumed to know what appropriations have been made, and he has no right to pay warrants unless drawn upon some specified fund, except when a claim is authorized by law to be paid out of a general contingent appropriation, he may pay the same upon the warrant of the Secretary. *Brown v. Fleischner*, 132.

TRUST.

1. UNINCORPORATED SOCIETIES MAY BECOME BENEFICIARIES OF A SPECIFIC TRUST.—Unincorporated societies, created for religious or benevolent purposes, when organized so as to entitle them to become incorporated under the laws of the State, are capable of becoming the beneficiaries of a specific trust created for their benefit, and our Courts will, in the exercise of a chancery jurisdiction, enforce such trusts. *Trustees M. E. Church v. Adams*, 76.
2. TRUSTEES OF SUCH SOCIETIES MAY SUE.—The trustees and agents of such societies have legal capacity to sue, when the suit is brought for the benefit of the association. *Id.*
3. PROPERTY IN TRUST—GRANTOR'S INTEREST IN.—A grantor of property in trust for a specific purpose retains such an interest therein as entitles him in equity to insist on a specific execution of the trust; but a diversion of trust property by a trustee from the purpose for which it was granted, does not operate as a forfeiture of the property or cause it to revert to the donor. *Chapman v. Wilbur*, 362.

TRUSTEE.

See TRUST.

UNDERTAKING.

1. ON APPEAL—WHEN TOO LATE FOR FILING UNDERTAKING.—If the undertaking on appeal is not filed within ten days after the service of notice of appeal, it is too late, and the cause will be dismissed unless leave is obtained to perfect the appeal. *Cross v. Chichester*, 114.
2. SUFFICIENCY OF SURETIES—WHEN EXCEPTION MUST BE TAKEN.—Exception to the sufficiency of the sureties on an undertaking on appeal must be made within five days from the filing of the undertaking. *Lewis v. Lewis*, 209.
3. COMPLAINT IN AN UNDERTAKING.—In a civil action on an undertaking in the nature of bail for defendant's appearance in a criminal case, the complaint should show that the prisoner was charged with a crime, and it is not sufficient to state that he was charged with "shooting and killing" another. *Hannah v. Wells*, 249.
4. STATEMENT OF CRIME CHARGED IN AN UNDERTAKING ON ARREST.—It is not necessary, in order to create a liability against the sureties on an under-

taking on arrest for crime, that the crime for which the person is admitted to bail should be set forth or described in the undertaking of bail with the same exactness that is required in an indictment or commitment. It is sufficient if the crime is referred to in general terms. *Hannah v. Wells* (per *McArthur, J., dissenting*), 249.

5. **AFFIDAVIT.**—The affidavit of the surety in an undertaking on appeal must be filed contemporaneously with the filing of the undertaking. *Holcombe v. Teal*, 352.

USE.

PUBLIC USE.—By public use is meant for the use of many, or when the public is interested. *Seely v. Sebastian et al.*, 25.

VERDICT.

1. **JURY ARE PRESUMED TO FIND.**—The jury are presumed to find every material allegation in the complaint in favor of the plaintiff, where a general verdict has been rendered in his favor in the Court below. *Torrence v. Strong*, 39.
2. **NOT OPEN TO REVIEW.**—A finding of fact is not open to review simply on a question as to the preponderance of evidence. *Fulton v. Earhart*, 61.
3. **SETTING ASIDE FINDING.**—When there may be ground for setting aside a finding or verdict, an appellate Court will proceed with caution if no motion was made in the Court below for a new trial. *Id.*
4. **ERROR TO RECEIVE, WHEN.**—It is error to receive the verdict of a jury in the absence of the defendant, where the crime charged is a felony. *State v. Spores*, 198.

VERIFICATION.

1. **COST-BILL.**—In taxing costs the practice requires a cost bill or statement of disbursements, which must state the items separately, specifying the amount of each item and for what the expense is incurred, and it must be verified. *Cross v. Chichester*, 114.
2. **SUFFICIENT VERIFICATION.**—Such verification is sufficient, if the party deposes that the items of the bill or statement are correct, as the deponent verily believes, and that the liability has been necessarily incurred. *Id.*

WAIVER.

OBJECTIONS NOT WAIVED BY FILING ANSWER.—Objections to the jurisdiction of the Court and to the sufficiency of the complaint to constitute a cause of suit, are not waived by answer to the merits. *King v. Boyd*, 326.

WARRANTS.

1. **AUTHORITY OF THE SECRETARY OF STATE IN AUDITING CLAIMS AND DRAWING WARRANTS.**—The authority of the Secretary of State to audit accounts and draw warrants upon the Treasurer, depends upon the condition that an appropriation has been made by the Legislature for their payment. *Brown v. Fleischer*, 132.
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except when a claim is authorized by law to be paid out of a general contingent appropriation, he may pay the same upon the warrant of the Secretary. *Id.*

WARRANTY.

See DEED, 3, 4.

WILLS.

CONSTRUCTION OF.—The intention of the testator must be looked to in construing a will. Wills operate upon what is found to actually belong to the estate of the testator. *Jette v. Picard*, 296.

WOMAN.

WIFE'S RIGHT OF ACTION AT LAW.—A divorced wife cannot maintain an action at law against her divorced husband upon an implied contract arising during coverture. *Pittman v. Pittman*, 298.

WRIT.

See MANDAMUS; REVIEW.

WRIT OF REVIEW.

See REVIEW, 1-5.

WRITTEN INSTRUMENT.

REFORMING WRITTEN INSTRUMENT.—In order to warrant a Court of equity in decreeing the reformation of a written instrument, the testimony must be clear and satisfactory. *Newsom v. Greenwood*, 119.

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